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Supreme Court of the United States

OCTOBER TERM, 1953.

No. 700

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE; MITSUI STEAMSHIP CO., LTD.; KAWASAKI KISEN KAISHA; NISSAN KISEN KAISHA, LTD.; TOHO KAIUN KAISHA, LTD.; IINO KAIUN KAISHA, LTD.; MITSUBISHI KAIUN KAISHA, LTD.; KOKUSAI KAIUN KAISHA, LTD.; NIPPON YUSEN KAISHA; OSAKA SHOSEN KAISHA, LTD.; SHINNIHON STEAMSHIP CO., LTD.; YAMASHITA KISEN KAISHA; WILHELMSEMS DAMPSKIBSAKTIESELSKAB; A/S DEN NORSKE AFRIKA-OG AUSTRALIELINIE; A/S TONSBERG; A/S TANKFART I; A/S TANKFART IV; A/S TANKFART V; A/S TANKFART VI; SKIBASKTIESELSKAPET VARILD; SKIBASKTIESELSKAPET MARINA; AKTIESELSKABET GLITTRE; DAMPSKIBSINTERESSENTSKABET GARONNE; SKIBSAKTIESELSKAPET SANGSTAD; SKIBSAKTIESELSKAPET SOLSTAD; SKIBSAKTIESELSKAPET SILJESTAD; DAMPSKIBSAKTIESELSKABET INTERNATIONAL; SKIBSAKTIESELSKAPET MANDEVILLE; SKIBSAKTIESELSKAPET GOODWILL; DAMPSKIBSSELSKABET AF 1912 AKTIESELSKAB; AKTIESELSKABET DAMPSKIBSSELSKABET SVENDBORG; SKIBSAKTIESELSKAPET IGADI; A/S BESCO; AKTIESELSKAPET IVARANS REDERI; A/S LISE; THE DE LA RAMA STEAMSHIP CO., INC.; THE OCEAN STEAM SHIP CO., LTD.; THE CHINA MUTUAL STEAM NAVIGATION CO., LTD.; NEDERLANDSCHE STOOMVAART MAATSCHAPPIJ "OCEAAN" N. V.; THE SWEDISH EAST ASIA CO., LTD.; WATERMAN STEAMSHIP CORPORATION; LYKES BROS. STEAMSHIP CO., INC.; UNITED STATES LINES COMPANY; STATES MARINE CORPORATION; STATES MARINE CORPORATION OF DELAWARE; DAIDO KAIUN KAISHA; AMERICAN PRESIDENT LINES, LTD.,

Petitioners,

—against—

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., and EZRA TAFT BENSON, Secretary of Agriculture,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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—against—

UNITED STATES OF AMERICA; ISBRANDTSEN COMPANY, INC.; and FEDERAL MARITIME BOARD, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners herein, the Japan-Atlantic and Gulf Freight Conference and its seventeen member lines, respectfully pray for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit to review a judgment of that court entered on January 21, 1954.

Opinion Below

The opinion of the court below and the dissenting opinion of Judge Fahy have not yet been officially reported. They are included in the record herein at R. 248 and R. 259.

Jurisdiction

The jurisdiction of this Court is invoked under 5 U. S. C. § 1040 and 28 U. S. C. § 1254(1). The petition is timely, the judgment of the court below having been entered on January 21, 1954.

Statement of the Case

On June 25, 1934, the Board,[1] pursuant to Section 15 of the Shipping Act, 1916 (46 U. S. C. § 814), approved an agreement under which, as amended, the Japan-Atlantic and Gulf Freight Conference has since been operating (R. 222). That agreement provides, *inter alia,* that one of the purposes of the Conference is the establishment, regulation and maintenance by agreement of the rates, tariffs and charges of its members (R. 223-4). Such tariffs and charges are established according to described methods and are filed pursuant to regulation with the Board. The Conference has as its members the seventeen carriers who are petitioners herein and who comprise all of the common carriers in the trade from Japan, Korea and Okinawa to United States Atlantic and Gulf ports, with the exception of the respondent Isbrandtsen Company, Inc. (to whom membership in the Conference has at all times been available).

Since its creation, the Conference has filed with the Board literally thousands of rates, rate changes and rules adopted by it. This practice is in accord with that required of all of the 105 existing freight con-

[1] The Federal Maritime Board and its predecessors are herein referred to as "the Board".

ferences operating on every important United States foreign trade route. The rate filings of these conferences made at the Board each year number in the tens of thousands.[2]

Because of the mass of such material filed with the Board each year, the Board early construed Section 15 of the Shipping Act to require approval by it in each instance of the conference agreements "whereby the carriers propose to be governed in their conference activities" but not to require an additional approval of all rates, tariffs and charges adopted pursuant to those agreements.[3]

This construction of Section 15 has for twenty-seven years been the fixed administrative practice of the Board. Once the basic conference agreements have been approved by the Board, the thousands of rate changes and rules thereafter adopted by the conferences are not made the subject of separate inquiry under Section 15 and no approval of them has been given. If certain proposed action or action actually taken under a conference agreement is deemed to be violative of the Shipping Act, it can be made the basis for a complaint and for a demand for reparations under Sections 22 and 23 of the Act (46 U. S. C. §§ 821, 822).[4] The Board upon its own initiative or upon complaint of others can also force postponement or abandonment of such proposed or actual actions under penalty of withdrawing its approval of the basic conference agreement on the ground that if the agreement is being interpreted as per-

[2] In its brief to the court below the Board stated, at p. 18, "During 1952 rate filings exceeded 2,000 . . . each month."

[3] *Section 15 Inquiry*, 1 U. S. S. B. 121 (1927).

[4] *E. g., Rawleigh* v. *Stoomvaart*, 1 U. S. S. B. 285 (1933).

mitting such action its disapproval under Section 15 is required. The Board has repeatedly exercised that power.[5]

Acting under their basic conference agreements, many conferences have adopted so-called contract/non-contract tariffs to defend against certain practices of non-conference lines which threaten the ability of the conference to maintain frequency of service and stability of rates. These tariffs establish a lower rate for any shipper who agrees to ship all of his cargoes on conference vessels as contrasted with shippers who do not enter into such agreements.

The Board has followed its normal administrative practice with respect to these contract/non-contract tariffs and has not required its approval in advance of their adoption.[6] Subsequent inquiry into their lawfulness and reasonableness could, however, be made on the Board's own motion or on the motion of some interested party. The courts, moreover, have refused to restrain conferences from employing such tariffs although no specific Board approval had been obtained, holding that the protestants were required to seek their relief before the Board in accordance with the procedures set forth in the Shipping Act.[7]

In 1948, however, a three judge District Court sitting in the Southern District of New York, while re-

[5] *E. g., Pacific Coast European Conference Agreement*, 3 U. S. M. C. 11 (1948).

[6] Thus until 1941 the petitioners employed contract/non-contract tariffs without specific approval thereof by the Board.

[7] *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474 (1932); *Far East Conference* v. *United States*, 342 U. S. 570 (1952).

fusing to pass on the validity of a contract/non-contract tariff until the Board in an adversary proceeding had first decided the question, held itself empowered, as a court of equity, to enjoin the employment of such tariff pending such proceedings because the Board did not there assert the power to delay the effectuation of such tariffs pending the outcome of the adversary proceeding.[8] As a result of that decision and of a subsequent decision in the same case,[9] and in order to cure judicial intimations of defects in the Board's procedure, the Board, effective November 11, 1952, adopted General Order 76 (R. 78). That order requires the filing of a statement giving notice of the effective date of a proposal to institute contract/non-contract tariffs 30 days in advance of its effectiveness and containing *prima facie* proof of the lawfulness of the use of such tariffs and the reasonableness of the differentials. It provides also a method by which protests to the proposed action can be filed with and considered by the Board prior to the tariffs becoming effective.

On December 24, 1952, the Japan-Atlantic and Gulf Freight Conference filed with the Board a statement containing its proposal for a contract/non-contract tariff (R. 82). As required by General Order 76, the statement set forth the reasons for the use of contract/non-contract rates and justified the differential between them.

The reasons advanced in support of the proposed tariff were generally that under the conference system,

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[8] *Isbrandtsen Co.* v. *United States*, 81 F. Supp. 544 (1948), appeal dismissed, *sub nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co., Inc.*, 336 U. S. 941 (1949).

[9] *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883 (1951), affirmed by an equally divided court, *sub nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co., Inc.*, 342 U. S. 950 (1952).

the Japan-Atlantic trade had enjoyed stability of rates over a long period of time and had experienced a progressive improvement in services rendered to shippers; that in recent periods, Isbrandtsen, a non-conference carrier, through the use of competitive practices long condemned by the Board, had been taking an increasing share of the traffic; that the Conference members were unable to compete effectively with Isbrandtsen while governed by the existing Conference rates; and that in order to permit effective competition without subjecting the trade to the dangers and evils of a full scale rate war, a contract/non-contract tariff was necessary and was in the public interest (R. 96-98).

Within the time prescribed by General Order 76, Isbrandtsen and the Department of Justice filed objections to the proposal (R. 140, 161, 171, 215, 217). Isbrandtsen claimed that the Conference's statement was deficient, that the reasons advanced for the adoption of the tariff were unsound, and that the amount of the differential had not been adequately supported. The Department of Justice similarly claimed that the Conference's statement was insufficient and urged that the use of a contract/non-contract tariff was violative of the Shipping Act and of the Anti-trust Laws. Both protestants requested a hearing and urged that the initiation of the proposal be suspended pending such hearings and final determination by the Board (R. 158-9, 216).

On January 21, 1953, the Board after considering the statement of the Conference in support of the proposed tariff, the comments, affidavits and documents relating thereto filed by Isbrandtsen and the Department of Justice, and the memorandum and affidavits

of the Conference in reply (R. 181, 201, 212), denied the requests for suspension upon the basis of the *prima facie* case made by the Conference and upon a finding that no irreparable injury would result to Isbrandtsen, but undertook to make a final determination of the whole matter by granting the requests of the protestants for a hearing (R. 220).

Isbrandtsen thereupon filed a petition for review of this action in the court below (R. 1) and at the same time applied for a stay of, and an interlocutory injunction against the Board's action. The petitioners intervened (R. 72). The interlocutory injunction was granted by the court without opinion, Judge Fahy dissenting (R. 239, 243). Petitions for Certiorari were filed in this Court by the Board and the Conference seeking a review of the grant of the interlocutory injunction. These petitions were denied, 345 U. S. 975. Thereafter, the court below entered the judgment of which review is here sought (R. 261). Judge Fahy again dissented.

Questions Presented

The court below, holding that the action of the Board refusing to suspend the proposal for a contract/non-contract tariff was a final order under Section 2 of the Hobbs Act (5 U. S. C. § 1032), set aside that "order" on the ground that such a proposal was an "agreement" or a "modification" of an agreement which required the specific approval of the Board under Section 15 of the Shipping Act before the parties could lawfully carry it out. It further enjoined petitioners from putting such proposal into effect

until the requisite approval had been obtained. The questions presented are:

1. Whether the Shipping Act, 1916, requires the Board to give specific approval to a practice so common among conferences as the use of contract/non-contract rates (and, indeed, potentially to every other kind of rate) before the rates may be initiated even though such rates have been established pursuant to procedures set forth in previously approved conference agreements?

2. Whether the Board may pursuant to its administrative practice and regulations deny, on the basis of a *prima facie* showing, a request for a postponement of a proposal for a contract/non-contract tariff adopted in accordance with an approved conference agreement provided that the Board at the same time undertakes to determine after a full hearing the ultimate question as to whether such proposal is violative of the Shipping Act or is otherwise to be prohibited under Section 15 of that Act?

3. Whether an order of the Board denying a request to suspend a proposal for a contract/non-contract tariff pending further hearings to determine whether the proposal violates any of the provisions of the Shipping Act or the other requirements of Section 15, which order does not purport to immunize the conference or its members from the penalties and reparations to which they may be subjected in the event their action is later found to be violative of the Shipping Act, is a final order reviewable under 5 U. S. C. § 1032?

Statutes Involved

The pertinent sections of the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U. S. C. § 801 *et seq.*, and of the Hobbs Act, Pub. L. No. 901, 81st Cong., 2d Sess., 64 Stat. 1129, 5 U. S. C. § 1031 *et seq.*, are set forth in the attached Appendix.

Specification of Errors to Be Urged

The court below erred:

(1) In holding that specific approval of the Board was required for a proposal to establish a contract/non-contract tariff by a conference despite the fact that such proposal was adopted pursuant to procedures set forth in a conference agreement that had theretofore been approved by the Board.

(2) In holding that the Board, upon a *prima facie* showing of the reasonableness and lawfulness of such a proposal for a contract/non-contract tariff, could not refuse to suspend such proposal and reserve to itself the right to consider its lawfulness after full hearing.

(3) In holding that a refusal of the Board to suspend the effectiveness of a proposal for a contract/non-contract tariff pending hearing upon its ultimate validity was a final order under Section 2 of the Hobbs Act (5 U. S. C. § 1032).

(4) In finding that irreparable injury would result to Isbrandtsen from the action of the Board despite an express finding by the Board to the contrary.

Reasons for Granting the Writ

I. The Decision of the United States Court of Appeals for the District of Columbia Circuit Is of such General Importance to the Foreign Commerce of the United States and to the Administration and Construction of the Shipping Act, 1916, as to Require Its Review by this Court.

The decision of the United States Court of Appeals for the District of Columbia Circuit has a direct, immediate and profound effect upon the foreign commerce of the United States and upon ocean carriers and shippers throughout the world. It is a bold reversal by the court of a well established and long standing construction given to Section 15 of the Shipping Act by the Board. It requires the Board to alter the method used for the past twenty-seven years in administering that Act, and it raises substantial obstacles to the continued effective administration of that Act. The impact and importance of this unprecedented decision by the court below requires its review by this Court.

Section 15 of the Shipping Act gives the Board supervisory power over all agreements between common carriers by water engaged in the foreign commerce of the United States which fix or regulate rates and control competition. It is by virtue of this section that American exporters are permitted to enjoy the same rate stability as do their foreign competitors who ship by carriers in freight conferences that exist in the foreign trade routes of the world. The administration of that section is vital to the entire scheme of conference operations and as such to American shipping and trade in our foreign commerce.

There are today 105 freight conferences operating on every major foreign trade route of the United States. All of these conferences operate under and by virtue of basic organic conference agreements which have been submitted to, and approved by the Board.

Limiting the decision of the court below to the very facts presented in this case, it means that these freight conferences may not establish contract/non-contract tariffs unless and until proposals to establish the same have been specifically approved by the Board. Today 64 conferences utilize contract/non-contract tariffs without specific and formal approval by the Board under Section 15.[10] The decision means, therefore, that all of the carriers in these 64 conferences have been and are acting illegally. To the individual members of these conferences it means they may now be faced with a multitude of suits for damages and reparations and to actions for the heavy penalties stipulated in Section 15 since although the Board was aware of such practices, they were technically violative of the Shipping Act inasmuch as they had not been specifically approved.

It means further that none of the conferences without such tariffs may institute them promptly when the competitive and economic conditions in their trades may require, but must await the outcome of protracted

[10] All of the conference agreements under which contract/non-contract tariffs have been promulgated authorize the conference to deal with rates, charges, tariffs, etc. A few of them in general terms expressly authorize the promulgation of contract/non-contract tariffs. Since such action is obviously the establishment of a particular form of tariff, the general authority to establish tariffs includes the authority to establish such a particular form of tariff, provided that it is not otherwise *ultra vires* the authority granted to the conference or violative of the standards set forth in Section 15 of the Shipping Act.

proceedings incident to formal approval by the Board. Since contract/non-contract rates represent the most important competitive tool used by conferences to maintain a stable rate structure and regularity of schedules in the face of competitors such as Isbrandtsen, whose consistent policy is to quote rates at a fixed percentage below conference levels, the decision means that whenever a conference is faced with such competition, due to the inherent delay required for specific Board approval, individual members will be forced either to resign from the conference so as no longer to be restricted by the conference rate levels, or the conference must itself declare an open rate situation to permit its members to charge whatever they desire.

Untoward delay in approval can in and of itself be destructive of the conference. Such a challenge, particularly in a period when cargoes are scarce, must be met quickly if at all. Not only does the decision prevent this but, as will be seen later, the import of the decision below might place an equal handicap upon the conferences' other method to deal with this problem, namely the resort to open rates.

The experience in the trade served by the petitioners herein is illustrative of this fact. Isbrandtsen entered this trade in mid-1947. Although membership in the conference was available to it, it refused to apply, and following its customary policy, it quoted rates at a fixed percentage below the conference rates. To defend their rate structure petitioners filed their proposal for a contract/non-contract tariff with the Board (R. 92-8). When the court below issued its temporary injunction, the proposal had to be abandoned, but the competitive problem facing the con-

ference lines remained. Since in the face of the economic crisis it was impractical for the conference to await final determination by the Board (indeed, although some seventeen months have elapsed since the proposal was filed, not even a preliminary examiner's report has been made), the only solution for the Conference was to declare an open rate situation. A vicious and destructive rate war has ensued—and in rate wars American carriers, because of their inherently higher costs, always suffer the most.

The import of the decision of the court below cannot be limited to contract/non-contract rate situations, for the theory of the decision is equally applicable to all rate revisions which may be proposed by a conference. The court below has suggested that "an interstitial sort of adjustment" under an approved conference agreement might not require specific approval by the Board (R. 257), and the Department of Justice suggested in its brief to that court that "routine rate adjustments" might not require such approval. Such semantic differentiations certainly form no guide for administrative action by the Board or by the carriers. Is a determination to open a rate, which may well be construed as an "agreement" to terminate a prior agreement on a rate, an "interstitial adjustment" or a "routine" matter? Such action by a conference is major in import. It is the use by the conference of the tool alternate only to the establishment of contract/non-contract tariffs and having the same objective, but at the sacrifice of rate stability.

Rates are fixed by the conferences as a result of economic and competitive situations. They must be flexible and responsive to the times and the particular characteristics of trade. A conference carrier can-

not, as a practical matter, use a conference rate which no longer reflects the economic situation in which it is operating. If specific Board approval is to be required for every rate change proposed by a conference, conference rate-making so far as carriers on American trade routes are concerned will be at an end; for even if the Board were substantially to increase its staff and streamline its procedures, it could not hope to pass upon the thousands of proposals it receives each month without a significant time lag. It could not even winnow out those that courts later might regard as "interstitial" or "routine". It is submitted that nothing in the history or the language of the Shipping Act contemplated such obstacles to conference rate-making.

II. The Decision of the Court Below Is in Conflict with Applicable Decisions of this Court.

Integral to the decision of the court below is its conclusion that the adoption by a conference of a contract/non-contract tariff is subject to the operation of the anti-trust laws and is, therefore, illegal *per se* in the absence of specific approval by the Board under Section 15 (R. 258-9). As a result, the court reasoned, the Board could not allow such a tariff to be used without its approval and the Conference lines should be enjoined from its use.

This is contrary to the holdings of this Court in two cases on this very subject, which decisions were not even cited by the court below. The decision is also contrary to a recent decision of that same court, the opinion in which was written by the same judge who wrote the majority opinion below.

In *U. S. Navigation Co.* v. *Cunard S. S. Co.,* 284 U. S. 474 (1932), and *Far East Conference* v. *United States,* 342 U. S. 570 (1952), this Court ruled that the use of contract/non-contract tariffs by a conference, although the use of such tariffs had not been approved by the Board and, indeed, although the proposal to use such tariffs had not even been filed with the Board, was not actionable under the anti-trust laws and that court proceedings seeking to enjoin their use could not be entertained until the Board had an opportunity to consider and rule upon the matter. And in *S. S. W., Inc.* v. *Air Transport Association,* 191 F. 2d 658 (D. C. Cir. 1951), the court below ruled that an anti-trust action against the Air Transport Association and its member lines could not be entertained until the Civil Aeronautics Board (whose statutory authority in this respect is similar to that of the Federal Maritime Board) was given an opportunity to pass upon the course of conduct of the Association and its constituent members.

If, as the court below concluded, the contract/non-contract tariffs are subject to the anti-trust laws and illegal *per se* in the absence of prior approval, then the injunctive relief sought in each of the three above decisions should have been granted.

Accepting those decisions as correct, however, the action of the court below has produced a truly anomalous result. If contract/non-contract rates are put into effect by a conference without prior reference to the Board, the courts will refuse to enjoin them under the anti-trust laws until the Board has adjudicated the matter. If, however, the proposal to employ such rates is submitted to the Board before its institution and the Board allows it to become effective upon a *prima facie*

showing as to its validity, but reserves its ultimate decision until a hearing be had, the courts may then treat that action as a violation of the anti-trust laws and grant an injunction. Thus, the less carefully the Board supervises the action of conferences from a public interest standpoint, the less the ability of the courts to give relief to persons affected by the conference action. Surely, neither Congress in adopting the Shipping Act nor the courts in their prior decisions in this field intended such a result.

The decision of the court below is without precedent. Respondents have relied upon *Isbrandtsen Co.* v. *United States,* 81 F. Supp. 544 (S. D. N. Y. 1948), appeal dismissed, *sub nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co., Inc.,* 336 U. S. 941 (1949), where a three judge district court granted an injunction against the use of a contract/non-contract tariff, as to which no *prima facie* showing of validity had been made, pending the filing of protests thereto with the Board and the disposition of such protests by the Board. But that decision rested upon the finding of the court that the Board did not then assert the power to afford a party temporary relief against irreparable injury pending consideration of the tariff by the Board, and the conclusion of that court that as a court of equity it could give such relief.

Since that decision General Order 76 now permits the Board to give preliminary consideration to proposals for contract/non-contract tariffs before they become effective. If, based upon the materials submitted and the Board's own expert knowledge of the trade, the Board believes no *prima facie* showing as to the validity of the proposal has been made, or

that immediate irreparable injury is likely to occur, it can act at that time to suspend it.[11] Thus there is no longer any need or basis for court intervention as in *Isbrandtsen* v. *United States, supra.*

Patently, General Order 76 sought to implement the handling of contract/non-contract tariff problems under Section 15 of the Shipping Act by subjecting this rate making function of conferences to supervisory safeguards more stringent than those prevailing prior to its adoption. These safeguards are akin to those controls that the Interstate Commerce Commission has been given over the tariffs of carriers subject to its jurisdiction. That Commission can suspend tariffs filed with it, but its refusal to do so pending a hearing on their lawfulness is not reviewable by the courts. *Carlsen* v. *United States,* 107 F. Supp. 398 (S. D. N. Y. 1952). In the absence of these increased safeguards that have been administratively devised, this Court has twice said that nevertheless the Board must first be asked to pass upon the legality of concerted carrier action before it can be enjoined. The court below, however, now says that the very existence of these administrative safeguards and compliance with them by the Board authorizes the court to enjoin such concerted carrier action prior to a determination by the Board of those very issues which have been committed to its primary jurisdiction.

This contradicts the very assumption this Court has said underlay the creation of the Board.

"And whatever may be the form of the agree-

[11] The statutory authority to suspend is derived from the power under Section 15 to disapprove conference agreements, combined with the power under Section 25 (46 U. S. C. § 824) summarily to revoke the prior order approving the conference agreement. *Contract Rates—North Atlantic*, 4 F. M. B. 98, 104 (1952).

ment, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing and determination would be to usurp that authority." *U. S. Navigation Co.* v. *Cunard S. S. Co.,* 284 U. S. 474, at 487.

III. The Order of the Board Was Not Subject to Judicial Review.

The decision of the court below holding the order of the Board to be "final" for purposes of judicial review is contrary to related decisions of this Court and represents an unprecedented expansion of the scope of judicial review under the Hobbs Act (5 U. S. C. § 1031 *et seq.*), which Act provides the jurisdictional basis for appeals from certain decisions of the Federal Communications Commission, the Secretary of Agriculture, and of the Maritime Administration and the Federal Maritime Board.

The court reasoned that since the refusal of the Board to suspend the institution of the contract/noncontract proposal had "grave consequences" on the operations of Isbrandtsen (R. 256), it was therefore "final" for purposes of judicial review. It is submitted that the economic impact of an administrative order is not, in and of itself, a sufficient basis for judicial review.

The court relied upon *Columbia Broadcasting System* v. *United States,* 316 U. S. 407 (1942), but it is submitted that that decision supports no such sweeping conclusion. In the dissenting opinion, Mr. Justice Frankfurter warned against confusing hardship with finality. He stated, "Hardship there

may well come through action of an administrative agency. But to slide from recognition of a hardship to assertion of jurisdiction is once more to assume that only the courts are the guardians of the rights and the liberties of the people." *Id.* at 446. The opinion of the majority of the Court in no way disagreed with this statement. Indeed, Chief Justice Stone recognized that there are a great many important administrative rulings which are not reviewable "either because they do not adjudicate rights or declare them legislatively, or because there are adequate administrative remedies which must be pursued before resorting to judicial remedies, or because there is no occasion to resort to equitable remedies." *Id.* at 424. It is submitted that the order here in question has present all three of these elements adverted to by Chief Justice Stone, any one of which is sufficient to preclude review.

In declining to take immediate action on the proposal, the Board did not hold the proposal lawful and thereby adjudicate or declare rights. Nor did the Board in any way preclude persons who might be injured by it from seeking damages or reparations therefor under Section 22 of the Act if it should ultimately be held unlawful by the Board or on appeal by a court.

Administrative action involving grave economic consequences has been held not to be "final" for purposes of court review. *United States* v. *Los Angeles R. R.,* 273 U. S. 299 (1927). And, indeed, administrative action resulting in the loss of many thousands of dollars which could in no way be recovered if the action were wrong, as distinguished from this case where Isbrandtsen could obtain full recoveries under the Shipping Act if it should be suc-

cessful in its protest, has been held not to be "final" for purposes of court review. *Petroleum Co.* v. *Comm'n.*, 304 U. S. 209 (1938); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938).

The decision of the court below in *Seaboard & Western Airlines* v. *Civil Aeronautics Bd.*, 181 F. 2d 515 (D. C. Cir. 1949), shows a clear awareness of these principles. In that case temporary mail rates fixed by the Board pending determination of permanent rates were held not to be "final" appealable orders despite the claim that the award of these temporary rates to the petitioner's competitors placed petitioner at a competitive disadvantage and threatened its very survival. The fact that in the subsequent permanent rate proceedings retroactive adjustments could be made was deemed controlling.

Finally, it is submitted that it is unwise for the courts to interfere with the administrative process at this stage. The field of transportation and especially international transportation is complex and in many cases unique. The business of common carriers by water "involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal". *U. S. Navigation Co.* v. *Cunard S. S. Co., supra,* at 485. The Board has adopted a procedure whereby on the basis of statements submitted to it by the conference and the protestants to the proposed conference action, the Board can, with its own expert

knowledge of the many facets to the problem, weigh the equities and grant or withhold interim relief pending its ultimate determination. Certainly under such a procedure there is no cause to resort to equitable remedies, for the very equities that the court can consider have been considered by the Board. The court below, moreover, did not find an abuse of discretion by the Board and in the absence of that fact, as that court itself recognized a month and a half later speaking through the same judge, there could be no reversal of an administrative order refusing to suspend action pending an ultimate decision of the matter by the administrative agency concerned. *Columbia Broadcasting System* v. *Federal Communications Commission,* D. C. Cir., decided March 11, 1954.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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April 19, 1954.

APPENDIX.

A. Selected provisions of the Shipping Act, 1916 (extracted from Title 46, U. S. C. A.).

* * * *

Sec. 15. (46 U. S. C. sec. 814.) Every common carrier by water, or other person subject to this chapter [Act], shall file immediately with the commission [board] a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter [Act], or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The commission [board] may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter [Act], and

shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the commission [board] shall be lawful until disapproved by the commission [board]. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the commission [board].

All agreements, modifications, or cancellations made after the organization of the commission [board] shall be lawful only when and as long as approved by the commission [board], and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

* * * *

Sec. 22. (46 U. S. C. sec. 821.) Any person may file with the commission [board] a sworn complaint setting forth any violation of this chapter [Act] by a common carrier by water, or other person subject to this chapter [Act], and asking reparation for the injury, if any, caused thereby. The commission [board] shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the commission [board] satisfy the complaint or answer it in writing. If the complaint is not satisfied the commission [board] shall, except as otherwise provided in this chapter [Act], investigate it in such manner and by such means, and make such order as it deems proper. The commission [board], if the

complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The commission [board], upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this chapter [Act].

Sec. 23. (46 U. S. C. sec. 822.) Orders of the commission relating to any violation of this chapter [Act] shall be made only after full hearing, and upon a sworn complaint or in proceedings instituted of its own motion.

All orders of the United States Maritime Commission, other than for the payment of money, made under this chapter [Act], as amended or supplemented, shall continue in force until its further order, or for a specified period of time, as shall be prescribed in the order, unless the same shall be suspended, or modified, or set aside by the commission, or be suspended or set aside by a court of competent jurisdiction.

* * * *

Sec. 25. (46 U. S. C. sec. 824.) The commission may reverse, suspend, or modify, upon such notice and in such manner as it deems proper, any order made by it. Upon application of any party to a decision or order it may grant a rehearing of the same or any matter determined therein, but no such application for or allowance of a rehearing shall, except by special order of the commission, operate as a stay of such order.

* * * *

Sec. 31. (46 U. S. C. sec. 830.) The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the commission [board] shall,

except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

• • • •

B. Selected provisions of the Hobbs Act, Public Law 901, 81st Congress, Second Session (1950) (extracted from Title 5, U. S. C. A.).

• • • •

Sec. 2. (5 U. S. C. sec. 1032.) The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders (a) of the Federal Communications Commission made reviewable in accordance with the provisions of section 402 (a) of Title 47, and (b) of the Secretary of Agriculture made under the Packers and Stockyards Act, 1921, as amended, and under the Perishable Agricultural Commodities Act, 1930, as amended, except orders issued under sections 210 (e), 217a, and 499g(a) of Title 7, and (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 830 of Title 46.

Such jurisdiction shall be invoked by the filing of a petition as provided in section 1034 of this title.

Sec. 3. (5 U. S. C. sec. 1033.) The venue of any proceeding under this chapter [Act] shall be in the judicial circuit wherein is the residence of the party or any of the parties filing the petition for review, or wherein such party or any of such parties has its

principal office, or in the United States Court of Appeals for the District of Columbia.

Sec. 4. (5 U. S. C. sec. 1034.) Any party aggrieved by a final order reviewable under this chapter [Act] may, within sixty days after entry of such order, file in the court of appeals, wherein the venue as prescribed by section 1033 of this title lies, a petition to review such order. Upon the entry of such an order, notice thereof shall be given promptly by the agency by service or publication in accordance with the rules of such agency. The action in court shall be brought against the United States. The petition shall contain a concise statement of (a) the nature of the proceedings as to which review is sought, (b) the facts upon which venue is based, (c) the grounds on which relief is sought, and (d) the relief prayed. The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition upon the agency and upon the Attorney General of the United States by mailing by registered mail, with request for return receipt, a true copy to the agency and a true copy to the Attorney General.

* * * *

Sec. 8. (5 U. S. C. sec. 1038.) The Attorney General shall be responsible for and have charge and control of the interests of the Government in all court proceedings authorized by this chapter. The agency, and any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review such order. Communities, associations, corporations, firms, and indi-

viduals, whose interests are affected by the agency's order, may intervene in any proceeding to review such order. The Attorney General shall not dispose of or discontinue said proceeding to review over the objection of such party or intervenors aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said proceeding unaffected by the action or nonaction of the Attorney General therein.

Sec. 9. (5 U. S. C. sec. 1039.) (a) Upon the filing and service of a petition to review, the court of appeals shall have jurisdiction of the proceeding. The court of appeals in which the record on review is filed, on such filing, shall have jurisdiction to vacate stay orders or interlocutory injunctions theretofore granted by any court, and shall have exclusive jurisdiction to make and enter, upon the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

(b) The filing of the petition to review shall not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. Where the petitioner makes application for an interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter [Act], at least five days' notice of the hearing thereon shall be given to the agency and to the Attorney General of the United States. In cases where irreparable damage would otherwise ensue to the petitioner, the court of appeals may, on hearing, after not less than five days' notice to the agency and to

the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than sixty days from the date of such order pending the hearing on the application for such interlocutory injunction, in which case such order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that such irreparable damage would result to petitioner and specifying the nature of such damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, upon a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application.

The hearing upon such an application for an interlocutory injunction shall be given preference and expedited and shall be heard at the earliest practicable date after the expiration of the notice of hearing on the application provided for above.

Upon the final hearing of any proceeding to review any order under this chapter [Act] the same requirements as to precedence and expedition shall apply.

Sec. 10. (5 U. S. C. sec. 1040.) An order granting or denying an interlocutory injunction under section 1039 (b) of this title shall be subject to review by the Supreme Court of the United States upon writ of certiorari as provided in section 1254 (1) of Title 28: *Provided,* That application therefor be duly made within forty-five days after the entry of such order. The final judgment of the court of appeals in a proceeding to review under this chapter [Act] shall be subject to review by the Supreme Court of the United States upon a writ of certiorari in accordance with the provisions of section 1254 (1) of Title 28: *Provided further,* That application therefor be duly made within ninety days after the entry of such judgment.

Either the United States or the agency or an aggrieved party may file such petition for a writ of certiorari. The provisions of section 1254 (3) of Title 28, regarding certification, and of section 2101 (e)[1] of Title 28, regarding stays, shall also apply to proceedings under this chapter [Act].

* * * *

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[1] Sub-section (e) must have been inadvertently referred to, in place of sub-section (f). The latter provides for stays pending certiorari, whereas the former does not deal with stays. The error seems to have crept into the statute due to the circumstance that when the Hobbs bill was introduced, the present sub-section (f) was designated subdivision (e); but that before the Hobbs bill was enacted, due to an amendment of 28 U. S. C. § 2101, in the meantime (Act of May 24, 1949, § 106 (b), 63 Stat. 104) the former subdivision (e) had become subdivision (f).

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. ——

FEDERAL MARITIME BOARD, PETITIONER

v.

UNITED STATES OF AMERICA AND ISBRANDTSEN COMPANY, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Federal Maritime Board respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, to review an order of that Court filed January 21, 1954, setting aside an order of the Board refusing to postpone or suspend contract/non-contract rates of the Japan-Atlantic and Gulf Freight Conference pending a hearing on protests to such rates.

A certified transcript of the record in this case has been furnished by Japan-Atlantic and Gulf

Freight Conference, petitioner in Docket No. 700, October Term, 1953.

OPINION BELOW

The Opinion of the Circuit Court of Appeals (R. 249) is reported in —— F. 2d ——. One judge dissented in a brief opinion (R. 259).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 21, 1954 (R. 261). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1), as prescribed by 5 U. S. C. Section 1040 (Section 10, 64 Stat. 1132).

QUESTIONS PRESENTED

Section 15 of the Shipping Act, 1916 (46 U. S. C. Section 814), authorizes the Federal Maritime Board to approve agreements among common carriers by water fixing rates or giving special rates. Such agreements, upon approval, are exempt from the anti-trust laws. Associations of carriers, known as conferences, organized for the purpose of fixing collective rates and practices, can lawfully function in concert only after Board approval. The organic agreements of conferences setting up the machinery for collective rate fixing have since enactment of the Shipping Act been deemed to require prior Board approval; in contrast, the specific conference rates or tariffs have been considered to be day to day routine activities of the conference, falling

within the scope of the collective activities authorized by the approved organic agreement. Such rates and tariffs, although not requiring prior separate approval, must nevertheless meet the standards of Sections 14–17 of the Act, by which the lawfulness of all rates and tariffs must be measured.

This construction of Section 15 has consistently been followed, so as to require specific prior approval of organic agreements of conferences but not of particular rates and tariffs, including so-called contract/non-contract rates under which a differentially lower rate is charged to shippers who sign contracts giving exclusive patronage to conference carriers.

After the decision in *Isbrandtsen Co., Inc.* v. *United States,* 96 F. Supp. 883 (S. D. N. Y. 1951), affirmed by an equally divided Supreme Court in *A/S J. Ludwig Mowinckels Rederi, et al.,* v. *Isbrandtsen Co., Inc.,* 342 U. S. 950 (1952), the Board promulgated General Order 76 (46 C. F. R. Part 236, 17 F. R. 10175) (R. 78) which requires conference carriers proposing to initiate contract/non-contract rates to file with the Board, on thirty days' prior notice, a statement setting forth the reasons for the use of contract/non-contract rates in the conference trade and the basis of the differential between said rates. General Order 76 effects no change in the Board's interpretation of Section 15 and is intended to provide information necessary to enable the

Board to review contract/non-contract rates then or thereafter in effect.

The Board's order in this case denied requests to suspend contract/non-contract rates proposed by the Japan-Atlantic and Gulf Freight Conference pending a hearing on protests thereto, but granted the hearing as requested. The Court of Appeals set aside the Board's order and permanently enjoined the conference from intiating contract/non-contract rates in its trade.

The fundamental questions are:

1. Whether Section 15 of the Shipping Act, 1916, requires the Board to give prior, separate approval to contract/non-contract rates of common carriers whose conference agreement, approved by the Board, provides for and contemplates the collective fixing of lawful rates.

2. Whether an order of the Board refusing to suspend contract/non-contract rates of conference carriers pending a hearing on protests thereto is a final order reviewable under 5 U. S. C. Section 1032.

STATUTES INVOLVED

The pertinent statutory provisions are printed in Appendix A, *infra,* pp. 29–40. They are Sections 14–17, inclusive, and 22–25, inclusive, Shipping Act, 1916, as amended (39 Stat. 733 et seq.; 46 U. S. C. Sections 812–816, inclusive, and 821–824, inclusive); and Sections 2, 4, 9, and 10, Review Act of 1950 (64 Stat. 1129–1132; 5 U. S. C. Sections 1032, 1034, 1039, and 1040).

STATEMENT OF THE CASE

On December 24, 1952, the Japan-Atlantic and Gulf Freight Conference, a conference of common carriers in the foreign commerce of the United States approved by the Board[1] under Section 15, filed a Statement (R. 82) with the Board, pursuant to General Order 76, giving notice that thirty days thereafter it proposed to initiate contract/non-contract rates in the conference trade. Under this proposal, shippers entering into exclusive patronage contracts with the conference carriers would be charged a differential in rates approximately 9½ percent below the rates chargeable to shippers who do not sign contracts. As required by General Order 76,[2] the Conference Statement, accompanied by affidavits, set forth the reasons for the use of contract/non-contract rates and the basis for the differential between said rates (R. 82–139).

[1] "Board," as used herein, refers to the Federal Maritime Board and its predecessor agencies. The United States Shipping Board was created by the Shipping Act, 1916 (46 U. S. C. 801, 39 Stat. 728) and was succeeded by the Secretary of Commerce by Executive Order 6166, June 10, 1933, the United States Maritime Commission by the Merchant Marine Act, 1936, section 204 (a) (46 U. S. C. 1114, 49 Stat. 1987), and the Federal Maritime Board by Reorganization Plan No. 21, section 104 (15 F. R. 3178).

[2] General Order 76 was promulgated by the Board, effective November 11, 1952, as a procedural rule requiring, insofar as here pertinent:

"#236.3 *Filing for initiation of contract/non-contract rates.*—Steamship freight conferences proposing to establish contract/non-contract rates to become effective after the

Pursuant to the General Order, notice of the Conference filing was published in the Federal Register, and twenty days were allowed for submission by interested parties of protests or comments relating to the proposal. Isbrandtsen Company, Inc., the only substantial carrier in the trade who is not a member of the Conference, and the Department of Justice duly filed protests (R. 140–180 and 215–216, respectively), the former attaching an affidavit alleging that initiation of the rates would result in irreparable harm (R. 161–170). Each requested that the

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effective date of this Rule shall file with the Federal Maritime Board at least 30 days prior to the initiation of such rates, a statement containing:

"(a) The amount of the spread or differential in terms of percentages or dollars and cents:

"(b) the effective date;

"(c) the reasons for the use of contract/non-contract rates in the particular trade involved, and the basis for the spread or differential between such rates; and

"(d) copies of the form of all contracts pertaining thereto.

* * * * *

"#236.6 *Notice.*—All information filed pursuant to this Rule shall be available for inspection by interested parties at the Regulation Office of the Board. A notice of the filing of the statement required under sections 236.2 and 236.3 above will be published in the Federal Register as soon as practicable. Except as may be otherwise provided in cases arising under section 236.4, interested parties shall have twenty (20) days after the date of such publication within which to submit written comments relating to the information filed with the Board pursuant to this Rule. Said comments may include a statement of position with respect to approval, disapproval, or modification, together with a request for hearings, should such hearing be desired."

Board set its protest for hearing (R. 158, 216). Isbrandtsen urged the Board "pending such a hearing, to postpone and suspend the initiation of [the] dual rate system" (R. 158–159); the Department of Justice prayed "that the Board suspend, and/or dismiss, disapprove, or cancel the proposed rate system" (R. 216).

On January 21, 1953, the Board issued the order (R. 220) which has been set aside by the Court below. The order granted the requests of Isbrandtsen and the Department of Justice for hearing on their protests, but denied their requests for suspension of the contract/non-contract rates pending such hearing. The pertinent portion of the Board's order (following a recital of the receipt of the Conference filing and of the comments and protests of Isbrandtsen and the Department of Justice, and of the Board's consideration of such papers) reads as follows:

> It Appearing therefrom that the Statement of the Conference filed December 24, 1952 complies with the requirements of General Order 76; and
>
> It Not Appearing from any of the above documents or other information now before the Board that the differential between said contract/non-contract rates is arbitrary, unreasonable, or unjustly discriminatory, nor that the initiation of the proposed contract/non-contract rate system will be unjustly discriminatory or unfair or detrimental to the commerce of the

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United States, or will be in violation of the Shipping Act, 1916, as amended, or will cause irreparable damage to Isbrandtsen Co., Inc.;

It is ordered, that the requests of the Department of Justice and of Isbrandtsen Co., Inc. for a suspension of the proposed contract/non-contract rates of the Japan-Atlantic and Gulf Freight Conference in the trade between Japan, Korea, and Okinawa and United States Atlantic and Gulf ports, pending hearing and determination, be denied; and

It is further ordered, That the requests of the Department of Justice and of Isbrandtsen Co., Inc. for a hearing on the said Protest and Comments be granted; and

It is further ordered, That such hearing be held before an Examiner of the Federal Maritime Board at a time and place to be fixed.

Thereupon, Isbrandtsen applied to the Court below for a stay of and a temporary injunction against the Board's order, pending that Court's review of the Board's action. A temporary injunction was granted, *per curiam,* one judge dissenting (R. 239–243). Petitions for certiorari, filed in this Court by the Board and the Conference seeking review of the grant of temporary injunction, were denied by this Court.[3]

[3] 345 U. S. 975 (1953).

Following its consideration of the case on the merits, the Court below, one judge dissenting, set aside the Board's order by its opinion and judgment of January 21, 1954, and permanently enjoined the Conference from initiating contract/non-contract rates in the trade.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In construing as a new agreement or as a modification of an existing agreement, so as to require prior approval, contract/non-contract rates which have been considered within the scope of the approved Conference agreement under the Board's administrative practice of many years. The effect of this construction is to require formal approval anew of matters already authorized by Board approval of the organic Conference agreement; to render largely meaningless the Board's approval of such agreements; to declare unlawful many conference activities, hitherto considered authorized by the Board; to throw into uncertainty the precise scope of permitted concerted activity; and to impose upon the Board the burdensome and rigid duty to review rates and rate practices of conferences before they may go into effect, rather than to employ the more flexible and commonly used administrative device of rate suspension coupled with subsequent hearing on the merits.

2. In exercising authority under 5 U. S. C. 1032, which permits review only of final orders, over the purely interlocutory order of the Board which expressly directed that a hearing be held on protests to the lawfulness of conference rates and merely denied requests for their suspension pending such hearing. The Court's ruling constitutes a departure from the well settled principle that orders of rate-regulating agencies suspending or declining to suspend proposed rates are neither final nor reviewable.

3. In setting aside the Board's order and thereby substituting its discretion for that of the Board on the question whether rates should be suspended—a matter requiring a high degree of expertise in the specialized field of transportation in the foreign commerce of the United States.

4. In finding that the initiation of the rates would remove Isbrandtsen from the trade, thereby substituting its discretion for that of the Board, which had found that it did not appear that Isbrandtsen would be caused irreparable harm.

REASONS FOR GRANTING THE WRIT

SUMMARY OF REASONS

1. The construction of Section 15 of the Shipping Act is of widespread public importance affecting common carriers, shippers and consignees in the foreign commerce of the United States. It is vital to the effective administration of the statute. Under the Board's long standing con-

struction of Section 15, conference rates, including contract/non-contract rates, have not been considered to constitute agreements as to which prior Board approval is required. In the traditional concept of rate-making, conference rates have been deemed lawful until expressly held unlawful by order of the Board after a hearing upon complaint or investigation upon the Board's own motion. The rate structure in all of the trades of the foreign commerce of the United States is made up of rates and tariffs filed with the Board pursuant to approved conference agreements; but the rates themselves have never been given specific prior approval. Whether that substantial part of the foreign commerce rate structure which consists of contract/non-contract rates is unlawful for lack of prior administrative approval is of critical importance to the administration of the Shipping Act and the foreign commerce of the United States. Issuance of the writ is justified in order to present for decision by the Supreme Court the fundamental question whether contract/non-contract rates, as other rates in foreign commerce, are lawful without prior approval and may go into effect unless suspended by the Board pending hearing.

2. The Court of Appeals has no jurisdiction or authority to review an interlocutory order of the Board. An order refusing to suspend rates pending a hearing—which is the full effect of the Board's order—is not a final order reviewable

under 5 U. S. C. Section 1032. Such an order represents the exercise of administrative discretion on a purely interlocutory issue and the Court below, in setting it aside, has substituted its discretion for that of the Board.

1. THE PUBLIC IMPORTANCE OF THIS ISSUE UPON THE EFFECTIVE ADMINISTRATION OF THE SHIPPING ACT

Under Section 15 of the Shipping Act, 1916 (46 U. S. C. Section 814), "every" rate-fixing agreement between common carriers by water in the foreign commerce of the United States must be filed with the Board for approval. Without prior Board approval, such an agreement between carriers is violative of the Shipping Act, 1916. In addition, Board approval extends to such concerted action exemption from the anti-trust laws.

The phrase "every agreement" in Section 15 created wide-spread uncertainty among conferences of ocean carriers as to the precise extent of its applicability to conference practices. Strictly speaking, day-to-day rate fixing or routine tariff activities by the conference are agreements between the member lines, and it became essential for the Board to construe the exact scope of the statutory reference to "every agreement."

To this end, the Board, in ***Ex Parte 4, Section 15 Inquiry,*** 1 U. S. S. B. 121, 124–125 (1927), conducted a formal rule-making proceeding, in which 192 carriers participated. The Board concluded that Section 15 called for the filing and approval, not of *every* concerted action by car-

riers, but only of those "agreements whereby the carriers *propose to be governed* in their conference activities as to matters specified in the first paragraph of [section 15] * * * such agreements are to be distinguished from the routine of conference activities." [Emphasis supplied.]

The rule thus stated has been consistently administered through the years so as to require approval of organic agreements of conferences which frame the outlines of conference activity but not of every action taken pursuant thereto. This rule has been the premise of a workable and equitable pattern of conference rate regulation. Organic agreements of conferences are formally considered by the Board when submitted for approval. They are given wide notice, and interested persons are granted the opportunity to submit their views to the Board. Upon complaint of an interested party, or upon its own motion where it is deemed necessary, the Board subjects such agreements to the full hearing process. If approval is merited, the organic agreement becomes, as it were, a charter or franchise which delimits the scope of lawful collective activity by the conference members. The subsequent fixing of rates and tariff regulations by a conference whose approved organic agreement provides for such activity is not and has never been considered an agreement or modification of an agreement within the meaning of Section 15 requiring specific prior approval. Never-

theless, no imprimatur of legality attaches to the conference rates themselves by virtue of approval of the organic agreement. Only the authority to fix rates collectively has been approved. The rates themselves are always subject to the traditional rate-making criteria of unjust discrimination and detriment to commerce as set up in such Sections as 14, 15, 16, and 17 of the Shipping Act. Under Section 22 (46 U. S. C. Section 821) any person upon complaint, or the Board on its own motion, may attack the lawfulness of any rate. Further, the Board is empowered, by Section 22, to award reparations to complainants injured by violations of the Act. There is, therefore, ample protection for injured persons if a conference establishes a rate or rates which are obnoxious under the Act.

Additional protection is available to the public. The Board is vested with plenary power over all conference activity, including rate-making, by reason of its broad jurisdiction over conference agreements. Under Section 15 "the Board may by order disapprove, cancel, or modify any agreement, or any modification or cancelation thereof, whether or not previously approved by it," that it finds to be unjustly discriminatory, or to operate to the detriment of commerce, or to be in violation of the Shipping Act. Under Section 25 (46 U. S. C. Section 824) the Board may reverse, suspend or modify, upon such notice and in such manner as it deems proper, any order

made by it. Where a conference action, such as the institution of contract/non-contract rates, is found to be unjustly discriminatory or otherwise violative of the Act, the Board is empowered to modify or cancel the conference's organic agreement.[4] The broad authority thus conferred upon the Board over the concerted action of carriers under their conference agreements carries with it the necessary discretion to establish procedures and formulate rules in aid of an effective administration of the statutory scheme of regulation. As an incident to such broad regulatory authority, the Board may direct the conference to suspend rates under sanction of cancelation of the basic conference agreement where such action is appropriate to effectuate the statutory purpose and policy. "Finding a wrong which it is duty bound to remedy, the Maritime Commission, as the expert body established by Congress for safeguarding this specialized aspect of the national interest, may, within the framework of the Ship-

[4] For example, in *Port Differential Investigation*, 1 U. S. S. B. 61 (1925), the Board exercised its plenary power over carriers acting in concert pursuant to a section 15 agreement. Finding that the agreement operated unfairly as between carriers, the Board disapproved and canceled it. Similarly, in *Contract Routing Restrictions*, 2 U. S. M. C. 220 (1939), and in *Contract Rates—North Atlantic Continental Freight Conference*, Docket No. 724, 4 F. M. B. 98 (1952), the Board required a conference to desist from initiating contract/non-contract rates, under penalty of cancelation of the organic conference agreement.

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ping Act, fashion tools for so doing." *California* v. *United States,* 320 U. S. 577, 584 (1944).

General Order 76 is a procedure established by the Board to assist it in the performance of its statutory responsibility to regulate the concerted activities of conference carriers. It requires the submission of information in advance of the effective date of contract/non-contract rates, with respect to their need in the trade and the reasonableness of the differential between such rates.[5] This information together with the comments of all interested parties submitted in response to the publication of the conference Statement enables the Board to exercise an informed judgment on the preliminary question whether the contract/non-contract rates proposed by the conference should be permitted to go into effect or suspended pending a hearing. Where there is likelihood that the rates will ultimately be found unlawful or where upon a balancing of the equities, the Board exercises its discretion in favor of the protesting parties, conferences have been directed

[5] General Order 76 was promulgated by the Board following the decision in *Isbrandtsen* v. *United States*, 96 F. Supp. 883 (S. D. N. Y. 1951, aff'd. 342 U. S. 950, by an evenly divided Supreme Court). That decision held that where the spread between the particular contract and the non-contract rates had been fixed arbitrarily, the rates were "unreasonably, and therefore unjustly, discriminatory; and the dual rate provisions which permit such rates are invalid." *Ibid.*, p. 889.

not to put rates into effect.[6] If, as in the instant case, the Board on balancing the equities declines to suspend, protesting parties may nonetheless avail themselves of all the remedies provided by the Shipping Act, including, under Section 22, the right to reparation, if upon subsequent hearing the rates are found by the Board to be unlawful.

This is the established pattern by which the Board regulates the rate activities of conferences which exist and function under Board-approved agreements in every essential trade route in the foreign commerce of the United States.[7] It results from the practical application of the regulatory authority created by statute; and it conforms with accepted patterns of rate regulation in other fields. There are sound reasons for the principle that prior approval is not required for individual rate-fixing actions of conferences. To require such prior approval would thrust upon the Board an intolerable burden of detail far in excess of the responsibility of any other regulatory agency

[6] *In the Matter of the Statement of the Trans-Pacific Freight Conference*, Docket 743; Contract Rates—*North Atlantic Continental Freight Conference*, Docket 724, 4 F. M. B. 98 (1952).

[7] Under section 211 (a) of the Merchant Marine Act, 1936 (46 U. S. C. section 1121) the Maritime Administrator, by delegation of the Secretary of Commerce, successor to the former United States Maritime Commission with respect to such functions, is charged with the duty to determine the ocean services, routes, and lines which are essential for the promotion, development, expansion, and maintenance of the foreign commerce of the United States.

in the field of transportation. In the export and import foreign trade of the United States rates are established for thousands of different commodities carried by conference members. Currently on file with the Board are 137 separate conference tariffs, 62 of which include contract/non-contract rates applicable to some or all commodities. In the ordinary course of business, the Board receives an average of 2,000 individual filings of rates or groups of rates per month. Fundamental changes in the Board's long-established practice will necessarily have a profound effect upon the daily activities of conferences governed by, and relying upon, that practice. Surely, the statutory construction followed for so long by the administrative agency in its practical experience is entitled to great weight. *Hirshberg* v. *Cooke,* 336 U. S. 210 (1949); *Commissioner* v. *Flowers,* 326 U. S. 465, 469 (1946); *Boehm* v. *Commission,* 326 U. S. 287, 292 (1945); *Helvering* v. *Winmill,* 305 U. S. 79, 83 (1938); *United States* v. *Shreveport Grain and Elevator Co.,* 287 U. S. 77, 84 (1932).

The conference agreement which is here involved is typical of many basic conference agreements which have been approved by the Board and pursuant to which rates are fixed. It provides for "the establishment, regulation and maintenance of agreed rates and charges" and that "there shall be no undue preference or unreasonable discrimination nor unfair practice

against any consignor or consignee by any of the parties hereto" and that "the giving or receiving of special rates * * * not offered to all shippers shipping under similar conditions is prohibited." These provisions—substantially as broad in their delineation of permissible rate fixing as the standards of lawfulness set forth in the Shipping Act itself—have been construed by the Board to constitute an agreement between carriers to fix rates which are not unlawful, including contract/non-contract rates as well as other types of differentially fixed rates. In approving the organic agreement, the Board regarded its approval as authorizing the establishment of a rate making machinery whereby the Conference could establish rates, including contract/non-contract rates, for the cargoes moving in the conference trade, subject to continuing regulatory authority. Thus, prior to World War II, this Conference, like other similarly situated conferences, established contract/non-contract rates which were used in the conference trade under Board surveillance and in reliance upon the administrative construction that the fixing of such rates was authorized by approval of the basic conference agreement. To require the conference to obtain prior formal administrative approval of such rates apart from the approval of the conference agreement making such rates possible would virtually destroy the flexibility of rate making essential to the business of ocean transportation.

The burden thereby thrust on the Board would tend to make its approvals a mere formality affording little protection to the public inasmuch as it would throw a cover of official condonation upon what could not even be properly investigated.

The Court below gave no heed to the effect of its decision upon the administrative agency, its practice over the years and the reliance of the trade upon it for their day-to-day business affairs. Whether a given conference activity constitutes an "agreement" within Section 15 is within the Board's primary exclusive jurisdiction. *Far East Conference* v. *United States,* 342 U. S. 570 (1952); *U. S. Navigation Co.* v. *Cunard S. S. Co.,* 284 U. S. 474, 486 (1932). Yet the Court below, with no clear explication of its reasoning, has held that the contract/non-contract rates proposed by the Conference constituted an "agreement" and that the Board erred in following its established administrative practice in considering the contract/non-contract rates within the Board-authorized scope of conference activity. It held, therefore, that this conference's organic agreement and the Board's approval thereof, which was intended to cover the collective fixing of all rates which are lawful, did not cover contract/non-contract rates. Thus, in effect the Court apparently reasoned either that contract/non-contract rates are *per se* unlawful or that, if not *per se* unlawful, the Board's approval, contrary to the

Board's intent, extended to the collective fixing of all lawful rates except contract/non-contract rates. That contract/non-contract rates are not *per se* unlawful under the Shipping Act, 1916, is clearly indicated in the legislative history. See Report of the House Committee on the Merchant Marine and Fisheries (the so-called Alexander Committee), H. R. Doc. 805, 63d Cong., 2d Sess., pp. 290, 295, 307; 53 Cong. Rec. 8077, 8095. Furthermore, this Court has at least inferentially so held. *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 304, 307 (n. 3) (1936).

Serious effects would necessarily follow if the opinion below is to be controlling. Practically all of the American-flag steamship lines operating regular or berth services from United States ports to all parts of the world are members of conferences, one or more of which use contract/non-contract rates.[8] There are 105 conferences serving this nation's foreign trade whose basic agreements provide for collective rate-making; of these, 62 conferences employ contract/non-contract rates. Only 9 of these 62 have in their organic agreements an express provision for the use of contract/non-contract rates; the great majority have no such express provision, and they are in a position similar to the Japan-Atlantic and Gulf Freight Conference. These 53 conferences presently employ contract/non-contract

[8] Of a total of 38 American-flag liner operators in the foreign trades, 36 are members of one or more conferences.

rates, as did the subject Conference prewar, in reliance upon the Board's long-standing construction of Section 15 that prior separate approval was unnecesary.[9] The consequence of the decision below would apparently render unlawful all such rates, for lack of affirmative approval. This in turn would give rise to a multiplicity of litigation for violation of the Shipping Act and claims for reparations by shippers who have paid and are now paying higher non-contract rates. Moreover, the use of contract/non-contract rates by such conferences, being in the opinion of the Court below an "agreement" requiring prior approval, would no longer be exempt from the anti-trust laws with possible concomitant civil and criminal consequences.

As above indicated, because of the implications in the decision below, uncertainty now exists as to the Board's regulatory duties with respect to conference agreements for rate fixing where contract/non-contract rates are now being used or hereafter may be used, if approval is necessary. Even where an approved organic agreement ex-

[9] Of the aforementioned 53 conferences, 22 have either made reference to contract/non-contract rates in subsequent amendments which have been given Board approval, or include in their organic agreements provisions implying (although not expressly referring to) the use of such rates, or have been the subject of formal docket decisions of the Board recognizing their use of contract/non-contract rates. Three other conferences which do not presently employ such rates have received similar implied approval of their use.

pressly provides in terms for contract/non-contract rates, prior approval may still be required. Nine conference agreements make such provision and, of these, seven conferences do not at the present time use such rates. Further, the Board's duties are in doubt with respect to proposals for the extension of contract/non-contract rates to additional items in their filed tariffs,[10] or to increase or decrease the differential between the thousands of particular contract and non-contract rates in use now or in the future. Strictly speaking, all such conference activity constitutes agreements or understandings between carriers within the meaning of Section 15 as construed by the Court below. If specific approval of changes in contract/non-contract rates is required, it is plain that the Board will be overwhelmed not only by the heavy administrative burden of reviewing, analyzing and approving rates in advance of their becoming effective, but also by its additional responsibility in connection with consequent litigation caused by the unlawfulness of those rates which have been in use without prior approval.

In addition to such heavy burdens, other problems of fundamental import to the Board will complicate its administrative practice of long standing. The flexible device of rate-suspension will be unavailable to the Board. It will be de-

[10] There are 16 conferences which use contract/non-contract rates in connection with some, but not all, commodities.

void of authority to exercise discretion upon a balancing of the equities occasioned by the needs and particular conditions of the trade in foreign commerce. Instead, all contract/non-contract rates will rigidly require prior approval—presumably predicated upon full hearing—notwithstanding such considerations as may dictate undelayed use of the rates to prevent cut-throat competition and rate war. The requirement of prior approval would also presumably necessitate review of all existing contract/non-contract rates so as to permit their use only after specific approval.[11] The magnitude of such a labor would make it difficult, if not impossible, for the Board to give more than superficial attention to each rate and reduce approval to a rubber-stamp process affording no safeguard to the public interest. Carriers on the one hand might be lulled into assuming that anti-trust exemption had been granted; shippers on the other hand might lose the protection now provided them by virtue of the mere formality of approval.

[11] Indeed, the reasoning of the Court below, carried to its strictly logical conclusion, would seem to dictate the need for separate prior approval for all rates of conferences, as well as contract/non-contract rates. It is manifest that the Board could not review and approve all conference rate filings, which exceed 2,000 individual rates or groups of rates (some of which include hundreds of individual rates), during an average month.

2. THE BOARD'S ORDER WAS NOT FINAL AND ITS REVIEW WAS BEYOND THE AUTHORITY OF THE COURT BELOW

In reviewing a Board order declining to suspend rates, the Court below departed from the well settled principle that such orders are interlocutory, as well as discretionary, and hence unreviewable. *Carlsen* v. *United States,* 107 F. Supp. 398 (S. D. N. Y. 1952); *Algoma Coal and Coke Co.* v. *United States,* 11 F. Supp. 487 (E. D. Va. 1935); *Kiser Co.* v. *Central of Georgia Ry. Co.,* 236 F. 573 (S. D. Ga. 1916), aff'd. 239 F. 718 (C. A. 5th, 1917). See *Board of Railroad Commissioners* v. *Great Northern Ry. Co.,* 281 U. S. 412, 429 (1929).[12] Because the jurisdiction of the Court derives from 5 U. S. C. Section 1032, which in terms deals only with final orders, the decision is fundamentally in error in that the Board's order was not an approval of rates but purely interlocutory. The application of Isbrandtsen and the Department of Justice expressly asked for postponement or suspension of the rates pending a hearing on their protests. The Board denied such application and declined

[12] Orders of the Interstate Commerce Commission temporarily suspending rates are similarly not amenable to judicial review. *Manhattan Transit Co.* v. *United States,* 24 F. Supp. 174 (D. Mass., 1938). See *Illinois Commerce Commission* v. *Thomson,* 318 U. S. 675 (1943). The Court below erred further in purporting to distinguish between the suspension power of the Interstate Commerce Commission and that of the Board.

to suspend the rates but it set down for hearing the lawfulness of the rates. Clearly the order was not an approval of rates since the Court below held that such rates are unlawful until and unless approved by the Board.[13] A refusal to suspend may not be considered an approval of rates. To characterize such an order as final does violence to its plain language and meaning, and completely disregards that every remedy made available by the Shipping Act is left open to the protestants. The criterion of finality laid down in *Chicago and Southern Air lines* v. *Waterman Steamship Corp.*, 333 U. S. 103, 113 (1948), cited by the majority of the Court below, can only sustain a conclusion opposite to that reached by the Court. For if administrative orders are ordinarly reviewable when "they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process," then surely an administrative order is not reviewable if it does no more than decline to suspend rates, subject to final determination on the merits after full hearing. Clearly, such an order effects no change in the obligations, rights, or legal relationships of the parties.

[13] The order of the Court below granted a temporary injunction against so much of the Board's order "as purported to *approve*, or to authorize and permit the institution" by the conference of contract/non-contract rates. [Emphasis supplied.]

Furthermore, the Court below erred in substituting its discretion for that of the agency. The decision to suspend or not to suspend is one inherently impressed with specialized considerations. It calls for "insight and aptitude which can hardly be matched by judges who are called upon to intervene at fitful intervals." *R. R. Commission* v. *Rowan & Nichols Oil Co.,* 311 U. S. 570, 575 (1941). Where, as here, the decision must chiefly depend upon a considered analysis of its results upon the foreign commerce of the nation, the agency's expertise should be entitled to great deference. Yet, the Court below in effect suspended the rates where the Board had considered suspension to be unjustified. It lightly dismissed the Board's view of the balance of equities, saying, "since Isbrandtsen, carrying slightly less than one third of the total volume of trade on the Japan-Atlantic route, is the only non-member line competing with Conference vessels, the impact of this system upon Isbrandtsen is readily apparent." It concluded that, "by denying Isbrandtsen's request to postpone operation of the dual rate system and to grant an immediate hearing, the Board virtually removed Isbrandtsen from the shipping market involved." In so concluding, the Court substituted its appraisal of the commercial situation for the Board's, and so departed from its appropriate role as a reviewer of administrative action.

We think the decision below is in error. It is pregnant with fundamental revisions in an administrative pattern conformed by long practice to the needs of ocean shipping. Far-reaching and basic alterations in this pattern, necessary if the decision below is to stand, will materially affect the foreign commerce of the United States.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

Section 14, Shipping Act, 1916, as amended, 39 Stat. 733, 46 U. S. C. sec. 812:

> SEC. 14. That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—
>
> First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term "deferred rebate" in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.
>
> Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this Act means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense.

Section 14a, Shipping Act, 1916, as amended, 39 Stat. 733, as amended, 46 U. S. C. sec. 813:

SEC. 14a. The Board upon its own initiative may, or upon complaint shall, after due notice to all parties in interest and hearing, determine whether any person, not a citizen of the United States and engaged in transportation by water of passengers or property—

(1) Has violated any provision of section 14, or

(2) Is a party to any combination, agreement, or understanding, express or implied, that involves, in respect to transportation of passengers or property between foreign ports, deferred rebates or any other unfair practice designated in section 14.

and that excludes from admission upon equal terms with all other parties thereto, a common carrier by water which is citizen of the United States and which has applied for such admission.

If the board determines that any such person has violated any such provision or is a party to any such combination, agreement, or understanding, the board shall thereupon certify such fact to the Secretary of Commerce. The Secretary shall thereafter refuse such person the right of entry for any ship owned or operated by him or by any carrier directly or indirectly controlled by him, into any port of the United States, or any Territory, District, or possession thereof, until the board certifies that the violation has ceased or such combination, agreement, or understanding has been terminated.

Section 15, Shipping Act, 1916, as amended, 39 Stat. 733, 46 U. S. C. sec. 814.

SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports;

limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful re-

straints and monopolies", and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

Section 16, Shipping Act, 1916, as amended, 39 Stat. 734, 46 U. S. C. sec. 815:

SEC. 16. That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue

or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

Section 17, Shipping Act, 1916, as amended, 39 Stat. 734, 46 U. S. C. sec. 816:

SEC. 17. That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such un-

justly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this Act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

Section 22, Shipping Act, 1916, as amended, 39 Stat. 736, 46 U. S. C. sec. 821:

SEC. 22. That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued may direct the payment on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The board, upon its own motion, may in like manner and except as to orders for the payment of money with the same powers, investigate any violation of this Act.

Section 23, Shipping Act, 1916, as amended, 39 Stat. 736, 46 U. S. C. sec. 822:

SEC. 23. Orders of the board relating to any violation of this Act shall be made only after full hearing and upon a sworn complaint or in proceedings instituted of its own motion.

All orders of the United States Maritime Commission, other than for the payment of money, made under this Act, as amended or supplemented shall continue in force until its further order or for a specified period of time, as shall be prescribed in the order, unless the same shall be suspended, or modified, or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

Section 24, Shipping Act, 1916, as amended, 39 Stat. 736, 46 U. S. C. sec. 823:

SEC. 24. That the board shall enter of record a written report of every investigation made under this Act in which a hearing has been held stating its conclusions, decision, and order, and, if reparation is awarded, the findings of fact on which the award is made, and shall furnish a copy of such report to all parties to the investigation.

The board may publish such reports in the form best adapted for public information and use, and such authorized publications shall, without further proof or authentication, be competent evidence of such reports in all courts of the United States and of the States, Territories, Districts, and possessions thereof.

Section 25, Shipping Act, 1916, as amended, 39 Stat. 736, 46 U. S. C. sec. 824:

> SEC. 25. That the board may reverse, suspend, or modify, upon such notice and in such manner as it deems proper, any order made by it. Upon application of any party to a decision or order it may grant a rehearing of the same or any matter determined therein, but no such application for or allowance of a rehearing shall, except by special order of the board, operate as a stay of such order.

Sections 2, 4, 9 and 10, Public Law 901, 81st Congress, 64 Stat. 1129–1132, 5 U. S. C. sections 1032, 1034, 1039, 1040:

> SEC. 2. The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders (a) of the Federal Communications Commission made reviewable in accordance with the provisions of section 402 (a) of the Communications Act of 1934, as amended, and (b) of the Secretary of Agriculture made under the Packers and Stockyards Act, 1921, as amended, and under the Perishable Agricultural Commodities Act, 1930, as amended, except orders issued under sections 309 (e) and 317 of the Packers and Stockyards Act and section 7 (a) of the Perishable Agricultural Commodities Act, and (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as

amended, as are now subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916, as amended.

Such jurisdiction shall be invoked by the filing of a petition as provided in section 4 hereof.

SEC. 4. Any party aggrieved by a final order reviewable under this Act may, within sixty days after entry of such order, file in the court of appeals, wherein the venue as prescribed by section 3 hereof lies, a petition to review such order. Upon the entry of such an order, notice thereof shall be given promptly by the agency by service or publication in accordance with the rules of such agency. The action in court shall be brought against the United States. The petition shall contain a concise statement of (a) the nature of the proceedings as to which review is sought, (b) the facts upon which venue is based, (c) the grounds on which relief is sought, and (d) the relief prayed. The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition upon the agency and upon the Attorney General of the United States by mailing by registered mail, with request for return receipt, a true copy to the agency and a true copy to the Attorney General.

SEC. 9. (a) Upon the filing and service of a petition to review, the court of appeals shall have jurisdiction of the proceeding. The court of appeals in which the record on review is filed, on such filing, shall have jurisdiction to vacate stay orders or interlocutory injunctions theretofore granted by any court, and shall have exclusive jurisdiction to make and enter, upon the petition, evidence, and proceed-

ings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

(b) The filing of the petition to review shall not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. Where the petitioner makes application for an interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this Act, at least five days' notice of the hearing thereon shall be given to the agency and to the Attorney General of the United States. In cases where irreparable damage would otherwise ensue to the petitioner, the court of appeals may, on hearing, after not less than five days' notice to the agency and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than sixty days from the date of such order pending the hearing on the application for such interlocutory injunction, in which case such order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that such irreparable damage would result to petitioner and specifying the nature of such damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, upon a like finding, may continue the temporary stay or

suspension, in whole or in part, until decision on the application.

The hearing upon such an application for an interlocutory injunction shall be given preference and expedited and shall be heard at the earliest practicable date after the expiration of the notice of hearing on the application provided for above.

Upon the final hearing of any proceeding to review any order under this Act, the same requirements as to precedence and expedition shall apply.

SEC. 10. An order granting or denying an interlocutory injunction under section 9 (b) of this Act shall be subject to review by the Supreme Court of the United States upon writ of certiorari as provided in title 28, United States Code, section 1254 (1): *Provided,* That application therefor be duly made within forty-five days after the entry of such order. The final judgment of the court of appeals in a proceeding to review under this Act shall be subject to review by the Supreme Court of the United States upon a writ of certiorari in accordance with the provisions of title 28, United States Code, section 1254 (1): *Provided further,* That application therefor be duly made within ninety days after the entry of such judgment. Either the United States or the agency or an aggrieved party may file such petition for a writ of certiorari. The provisions of title 28, United States Code, section 1254 (3), regarding certification, and of title 28, United States Code, section 2101 (e), regarding stays, shall also apply to proceedings under this Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 700

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., AND EZRA TAFT BENSON, SECRETARY OF AGRICULTURE

No. 703

FEDERAL MARITIME BOARD, PETITIONER

v.

UNITED STATES OF AMERICA AND ISBRANDTSEN COMPANY, INC.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 248-260) is reported at 211 F. 2d 51.

JURISDICTION

The judgment of the Court of Appeals (R. 261) was entered on January 21, 1954 (R. 261). The petitions for writs of certiorari were filed on April 20, 1954. The jurisdiction of this Court is invoked under 5 U. S. C., Supp. V, 1040, and 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

In December, 1952, the Japan-Atlantic and Gulf Freight Conference, an association of water carriers, filed a statement with the Federal Maritime Board proposing the introduction of a dual rate system, a system which would require all shippers in the trade involved to employ the Conference lines exclusively on pain of being charged 9.5% higher tariffs if they failed to contract. On January 21, 1953, the Board, without prior hearing and over the timely objections of Isbrandtsen Company, Inc. (a non-Conference line) and the United States, issued an order permitting the employment of the system as of January 23, 1953. The Board reserved for consideration at a future hearing the protests filed by Isbrandtsen and the United States. On petition for review filed by Isbrandtsen, the Court of Appeals set aside the Board's order insofar as it permitted the system to go into operation without the prior approval required by section 15 of the Shipping Act. The court also enjoined the Conference carriers (petitioners in No. 700) from employing the system in the absence of such approval. The following questions are presented:

1. Whether an agreement by a conference of water carriers to adopt a dual rate system is an

agreement within the meaning of section 15 of the Shipping Act, and is accordingly illegal unless and until approved by the Board as consistent with the criteria set forth in that section.

2. If so, whether the Court of Appeals was authorized to grant injunctive relief preventing effectuation of the agreement pending administrative hearing and determination of the objections of the protesting parties.

STATUTE INVOLVED

The Shipping Act, 1916, 39 Stat. 728, as amended, 41 Stat. 996, 46 U.S.C. 801 *et seq.*, provides in part as follows:

> Sec. 14. That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country,—
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> * * * * *
>
> Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason. [46 U. S. C. 812.]
>
> * * * * *
>
> Sec. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the [Board] a true copy,

or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The [Board] may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications or cancellations.

Agreements existing at the time of the organization of the [Board] shall be lawful until

disapproved by the [Board]. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the [Board].

All agreements, modifications, or cancellations made after the organization of the [Board] shall be lawful only when and as long as approved by the [Board], and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and Acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action [46 U. S. C. 814].

STATEMENT

Petitioners in No. 700 are a Conference of water carriers and its member steamship lines, all of which are engaged in the transportation of prop-

erty between ports in Japan, Korea, and Okinawa, and ports on the Gulf and Atlantic coasts of the United States (R. 82, 222-3). They operate as a conference under a general agreement approved in 1934, pursuant to section 15 of the Shipping Act (*supra*, pp. 3-5), by the Federal Maritime Board's predecessor.[1] This agreement, which has been amended from time to time, has been continuously approved since that date (R. 222-238).

The basic or organic agreement of the Conference provides in substance that the member lines shall act jointly in establishing rates, and that the rates of each shall be those agreed upon and published in Conference tariffs (R. 223-4). This agreement also declares that "there shall be no undue preference or advantages nor unjust or unreasonable discrimination nor unfair practices against any consignor or consignee by any of the parties hereto" (R. 225, par. 5), and that the "giving or receiving of special rates * * * not offered to all shippers shipping under similar conditions is prohibited" (R. 226, par. 7). The basic agreement makes no reference to the employment of a so-called dual rate or contract/non-contract system.

On December 24, 1952, however, the Conference filed with the Board (petitioner in No. 703) a statement proposing the adoption of a certain contract/non-contract rate system, to become effective

[1] The term "Board" will be used in this brief to refer either to the Federal Maritime Board or to the appropriate predecessor agency.

thirty days thereafter (R. 82-139).[2] "Under the proposed system, shippers who refused to agree in writing to employ Conference lines exclusively would be charged, for the identical transportation and service, tariffs which were nine and one-half per cent higher than those charged shippers who had executed such agreements with Conference lines. And once this exclusive patronage contract

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[2] In implementation of section 15 of the Shipping Act (*supra*, pp. 3-5), the Board has prescribed regulations setting forth the procedure to be followed by conferences proposing to initiate a dual rate system. The Board's General Order 76 (17 Fed. Reg. 10175, November 11, 1952, R. 78-81) provides in pertinent part:

> § 236.3. *Filing for initiation of contract/non-contract rates.* Steamship freight conferences proposing to establish contract/non-contract rates to become effective after the effective date of this Rule shall file with the Federal Maritime Board at least 30 days prior to the initiation of such rates, a statement containing:
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> (a) The amount of the spread or differential in terms of percentages or dollars and cents;
>
> (b) The effective date;
>
> (c) The reasons for the use of contract/non-contract rates in the particular trade involved, and the basis for the spread or differential between such rates; and
>
> (d) Copies of the form of all contracts pertaining thereto.
>
> * * * * *
>
> § 236.6 *Notice.* All information filed pursuant to this Rule shall be available for inspection by interested parties at the Regulation Office of the Board. A notice of the filing of the statement required under sections 236.2 and 236.3 above will be published in the Federal Register as soon as practicable. Except as may be otherwise provided in cases arising under section 236.4, interested parties shall have twenty (20) days after the date of such publication within which to submit written comments relating to the information filed with the Board pursuant to this Rule. Said comments may include a statement of position with respect to approval, disapproval, or modification, together with a request for hearing, should such hearing be desired.

had been entered into, even a single shipment with any non-Conference carrier would result in the shipper's being required to pay the Conference, as liquidated damages, fifty per cent of the freight charge which the shipper would have paid had such shipment been made in a Conference vessel. If such violations occurred more than once in any year, the shipper's contract with the Conference would be cancelled and he would not be permitted to enter into a new agreement until the liquidated damages had been paid in full" (R. 250-1).

Within the time prescribed by Board regulations (see General Order 76, § 236.6, note 2, *supra*), the United States and Isbrandtsen (the only non-Conference line in the trade involved) filed protests with the Board, urging that the proposal was unreasonable, retaliatory, unjustly discriminatory and illegal under the Shipping Act, and should be disapproved, and requesting that its effective date be suspended pending the conduct of a full hearing (R. 140-180, 215-216).

On January 21, 1953, the Board, without having conducted a hearing, entered the order under review. This order finds (R. 221) that it does not appear "that the differential between said contract/non-contract rates is arbitrary, unreasonable, or unjustly discriminatory, nor that the initiation of the proposed contract/non-contract rate system will be unjustly discriminatory or unfair or detrimental to the commerce of the United States, or will be in violation of the Shipping Act, 1916, as amended, or will cause irreparable damages to

Isbrandtsen Co., Inc." The order concludes by denying the protestants' request for suspension of the effective date of the proposal and by ordering a hearing on the issues raised by the protests at a time and place to be fixed in the future.

Isbrandtsen thereupon instituted its review proceedings, naming the United States and the Board as respondents.[3] On March 23, 1953, the Court of Appeals issued an injunction *pendente lite,* finding, *inter alia,* that "the institution of the proposed exclusive patronage dual rate system would greatly injure [Isbrandtsen's] business as an independent carrier and would, through loss of patronage, subject [Isbrandtsen] to the grave jeopardy of elimination from the trade" (R. 241-2). The Conference and the Board applied for writ of certiorari, urging that the Court of Appeals was without jurisdiction to enjoin the Board's action. This Court denied the writ, 345 U. S. 975.

On January 21, 1954, the Court of Appeals issued its opinion on the merits (R. 248), holding (1) that the Conference agreement to adopt the dual rate system was clearly an agreement (or a modification of an agreement) required to be submitted to the Board under section 15 of the Shipping Act; (2) that, under that section, such agreements are illegal unless and until approved by the Board; (3) that the Board's action permitting the system to take effect in advance of hearing and determina-

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[3] The Conference and its members intervened in support of the Board's order (R. 72), and the Secretary of Agriculture intervened in support of Isbrandtsen (R. 247).

tion under section 15 was unauthorized; and (4) that such action by the Board was immediately reviewable because it was determinative of important rights and because the institution of the system threatened Isbrandtsen with "real, immediate and incalculable harm." The court's judgment (R. 261-2) restrains effectuation of the Conference proposal pending a Board determination of its legality in conformity with section 15 of the Shipping Act.[4]

ARGUMENT

1. The case of *Isbrandtsen Co.* v. *United States*, 81 F. Supp. 544 (S. D. N. Y.), appeal dismissed *sub nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co.*, 336 U. S. 941, appears decisive on the proposition that a dual rate proposal must be specifically and independently considered, in accordance with proper administrative procedures, before it can have any claim to legality. In that case, the Board had given its summary approval to basic Conference agreements, filed by two North Atlantic conferences, which *in terms* provided that the conferences might employ the dual rate device. Isbrandtsen, which had not protested to the Board, sought an injunction from a three-judge district court[5] to restrain the conferences involved from effectuating their announced intention to put an

[4] Evidentiary hearings before the Board's examiner were completed, some months ago. There has been no decision by the agency.

[5] Prior to the Act of December 29, 1950, 5 U.S.C., Supp. V, 1031, *et seq.*, suits to set aside Board orders were brought before three-judge district courts, rather than before courts of appeals. Shipping Act, § 31, 46 U.S.C. 830.

exclusive patronage system into immediate operation. It also asked the court to restrain so much of the Board's order as authorized use of such system. The court issued an injunction so that Isbandtsen might go back to the Board and obtain a full evidentiary hearing on the propriety of the particular dual rate proposals in question.

The conferences appealed to this Court, urging that the lower court was without jurisdiction to grant injunctive relief, and that Isbrandtsen's only remedy was to complain to the Board and to await final administrative disposition of its complaint. Isbrandtsen, for its part, contended that the lower court clearly had the power to prevent unauthorized institution of a dual rate system in advance of a full determination of its legality, and that the appeal presented no substantial question warranting full argument. See No. 622, Oct. Term, 1948, statement as to jurisdiction, motion to affirm, and reply thereto. This Court dismissed the appeal *per curiam*.[6]

If, as clearly held by the above decision, Board approval of an agreement providing, generally,

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[6] The Board subsequently held an adversary proceeding and approved the proposals. When the case went back to the district court, the court held that the differentials between the contract and non-contract rates were not justified by the Board's findings and were arbitrary, unreasonable, and unjustly discriminatory. The court found it unnecessary to reach the question whether a dual rate system is *per se* illegal under the Shipping Act. The judgment of the district court was affirmed on appeal by an equally divided court. *Isbrandtsen* v. *United States*, 96 F. Supp. 883 (S.D. N.Y.), affirmed *sub nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co.*, and *Federal Maritime Board* v. *United States*, 342 U.S. 950.

for use of the dual rate system is ineffective in the absence of full and explicit consideration of the dual rate provision of the particular contract, it needs no argument that the Board's approval, in the instant case, of a basic Conference agreement which made no mention of dual rates was ineffective, standing alone, to authorize the employment of a dual rate system.[7]

The claim made by petitioners in No. 700 (Pet., p. 14 et seq.) that the decision below conflicts with *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, and *Far East Conference* v. *United States*, 342 U. S. 570, is without foundation. Those cases held that the legality of a dual rate system might not be challenged initially by a suit filed under the antitrust laws, but should be determined in the first instance by the Board pursuant to the procedures provided in the Shipping Act. The decision below held simply that the Board has failed to follow the procedures required by the Shipping Act, a conclusion which is actually supported by the *Cunard* and the *Far East* cases.

Thus, when *Cunard* was before the Court of Appeals for the Second Circuit, that court observed (50 F. 2d 83, 89) that "the failure to secure the approval of [a dual rate] agreement [is] forbidden by the Shipping Act * * *." This Court, in affirming, declared that the courts should not take jurisdiction under the antitrust laws "in advance of

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[7] On its face, the language of the basic agreement of the Japan-Atlantic Conference appears inconsistent with the employment of any dual rate system. See p. 6, *supra*.

* * * hearing and determination" by the Board under the Shipping Act (284 U.S. at 487). The *Far East* case held that the same principles apply when the antitrust suit is one instituted by the Government. The decision of the Court of Appeals in the instant case holds, quite consistently, that action by carriers which is illegal in the absence of Board approval shall not be permitted to take effect before the Board has fully performed the statutory duty within its primary jurisdiction—"advance * * * hearing and determination."[8]

2. Examination of the Shipping Act compels the conclusion that the Board's action permitting the initiation of the dual rate system was unauthorized. Under section 15, water carriers subject to the Act are required to file with the Board a true copy (or, if oral, a true and complete memorandum) of *every* inter-carrier agreement (or modification or cancellation thereof) to which they are party, if such agreement relates, *inter alia,* to any of the following matters:

(1) "fixing or regulating transportation rates or fares";

(2) "giving or receiving special rates * * *";

[8] Contrary to the Conference's suggestion (Pet. in No. 700, p. 15), there is no "anomaly." This Court has held that antitrust proceedings against conferences for allegedly unauthorized activities shall not be entertained until the Board, the expert body charged with the regulation of conference activities, has spoken. But this cannot immunize agency action, if found to be unauthorized under the Shipping Act and to threaten irreparable injury, from the supervision of the reviewing court. That was the basis for the injunction in the first *Isbrandtsen* case, as well as in the instant case.

(3) "controlling, regulating, preventing, or destroying competition."

The section further states that the term " 'agreement' * * * includes understandings, conferences, and other arrangements."

All agreements made subsequent to the organization of the Board are explicitly declared unlawful "before approval or after disapproval" by the Board (*ibid.*). They shall be lawful, the Act states, "only when and as long as approved * * *" (*ibid.*).

The Act also defines with particularity the criteria that are to be satisfied before an agreement filed with the Board may be lawfully approved and granted the special immunity from the antitrust laws which such approval carries with it. Section 15 provides in substance that the Board shall approve an agreement if it "finds" (1) that it is not "unjustly discriminatory or unfair as between carriers, shippers, etc."; (2) that it will not "operate to the detriment of the commerce of the United States"; and (3) that it is not in violation of provisions of the Shipping Act.

The Statement which the Conference filed with the Board in December 1952 was a memorandum of an agreement reached by the members of the Conference to adopt, on a certain date, a certain practice, namely, the practice of charging shippers undertaking to sign exclusive patronage contracts 9.5% less than the published rates available to shippers at large. As such, it is an agreement re-

lating to the regulation of transportation rates. Moreover, the proposed system involves the giving of special rates to a particular group of shippers —those agreeing to sign exclusive patronage contracts. Finally, it is a system which has as its clear purpose the destruction of such competition as is currently being provided by Isbrandtsen, the lone non-Conference member in the trade.[9] On three distinct counts, therefore, we believe it plain that the agreement is of a kind required to be filed under section 15.[10]

Since agreements required to be submitted to the Board under section 15 are explicitly declared unlawful "before approval," it follows that the Board was without power to sanction the initiation of the Conference's dual rate proposal in advance of hearing and determination of the legal and factual issues raised by the United States and Isbrandtsen.

3. Petitioners, seeking to avoid the impact of section 15, emphasize the fact that the organic agreement pursuant to which the Conference oper-

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[9] Obviously, that is the sole reason for the adoption of the agreement. Since the only shippers upon whom this dual rate system would have impact are shippers interested in doing business with Isbrandtsen, it necessarily follows that, to the extent shippers are influenced by the rate differentials, to such extent they will be coerced into withdrawing business from Isbrandtsen. And since, in the nature of things, most shippers are dependent upon the availability of service from various lines, the effectiveness of a dual rate system as an economic weapon is scarcely to be doubted. See *infra*, pp. 18-19.

[10] This, of course, is not to say that the agreement is one which may be approved. The reporting or filing requirements of section 15 are comprehensive. But the Board is only empowered to approve those filed agreements found to meet the criteria specified in the Act.

ates has been explicitly approved by the Board. To this the short answer is that the basic Conference agreement neither mentions nor foreshadows the employment of any dual rate system, no less the adoption of the particular agreement involved in this case.

The requirement of advance consideration of "every agreement * * * or modification or cancellation thereof" was deliberately imposed by Congress. While the draftsmen of the Shipping Act stated that they were prepared to admit that there might be advantages in steamship agreements and conferences, they added that they were "not disposed to recognize [them] unless the same [were] brought under some form of *effective government supervision.* To permit such agreements without government supervision would mean giving the parties thereto unrestricted right of action. Abuses exist, and the numerous complaints received by the committee show that they must be recognized. In nearly all the trade routes to and from the United States the conference lines have virtually a monopoly of the line service" (Alexander Report, H. Doc. 805, 63rd Cong., 2nd Sess., pp. 417-8; italics added).

4. Petitioners also argue that, as a matter of administrative practice, the Board has long permitted conferences to effect routine rate changes without prior specific approval. They suggest further that the adoption of a dual rate system should be treated like ordinary rate-making. And they contend finally that the decision below "is pregnant with

fundamental revisions in an administrative pattern conformed by long practice to the needs of ocean shipping" (Pet. in No. 703, p. 28).

In *Ex Parte 4, Section 15 Inquiry,* 1 U.S.S.B. 121, the Board conducted an inquiry for the express purpose of determining the meaning of the word "every" as used in the clause of section 15 requiring "every agreement * * * or modification thereof" to be filed. It concluded (p. 125) that it would be "too literal [an] interpretation of the word 'every' to include routine operations relating to current rate changes *and other day-to-day transactions*" (italics added). But the Board made clear that the exception from the statute which it was proposing to create was a very narrow one and that it would not apply, *inter alia,* to agreements "giving or receiving special rates * * * or destroying competition * * * or in any manner providing for an exclusive * * * working arrangement" (p. 125, note).

The Court of Appeals neither stated nor implied that the Board was required to give specific advance consideration to routine day-to-day rate adjustments and like transactions. It declared only that the adoption of the proposed exclusive patronage system "can hardly be classified as an interstitial sort of adjustment since it introduces an entirely new scheme of rate combination and discrimination not embodied in the basic agreement" (R. 257).

This declaration is palpably correct. No analogy can be drawn between routine day-to-day rate adjustments and the institution of a dual rate system.

The latter does not involve rate-making at all, but rather the adoption of a drastic technique of economic warfare whose open, if not avowed, purpose is to drive out the independent carrier. In a brief filed in the earlier *Isbrandtsen* case, the Board stated:

> The contract system should be frankly recognized as a device tending towards the monopolization of ocean commerce in particular trades by the members, collectively, of conferences which serve those trades. We use the word "monopolization" with no ideological overtones, but merely in its dictionary sense, which is the obtaining or assumption of "exclusive possession or control." Whether the contract system in a particular case actually has the effect of producing a complete monopoly (i.e., control of a trade) depends upon how well it works; admittedly, it is monopolistic in purpose. The extent to which it is monopolistic in effect depends upon how successfully that purpose is achieved * * *. The record warrants the conclusion that if a contract system is wholly effective, it will result in a complete monopoly in the sense that all cargo moving in a trade where the system is used, will move in ships of conference carriers. Necessarily, in these circumstances, there would be no service by independent operators * * *. In considering the system itself (precedent to examination of specific contract provisions), we feel that this court should assume that the conference contracts are in fact effective; that shippers sign them in substantial numbers, voluntarily or as a choice of evils; that they

> exclude Isbrandtsen from carrying the freight of all shippers who sign; and that the contracts seriously restrict Isbrandtsen's access to cargoes for its ships, and will continue to do so if, and as long as, the conferences employ the contract system and Isbrandtsen remains a non-member.[11]

A system which frankly aims at nothing less than "producing a complete monopoly" is not, by any standard, routine rate-making or an ordinary day-to-day transaction. In the light of the provisions of section 14 Third of the Shipping Act (*supra*, p. 3), there are grave doubts whether such a system is susceptible of Board approval. The Board itself, on a number of past occasions, has condemned the dual rate device.[12] It seems plain, at the least, that an agreement to adopt the system

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[11] The quoted passage is set forth in the margin of the opinion of the three-judge district court. See *Isbrandtsen* v. *United States*, 96 F. Supp. at 888.

[12] In *Eden Mining Co.* v. *Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41, 45-6, the Board, referring to the dual rate system, stated:

> Under the statute, the complainants, as members of the shipping public, were entitled to have their shipments carried at the same rates as other patrons who received identical service. This right attached to each individual transportation transaction as such, and was not to be predicated upon any condition imposed by the respondent restricting the complainants' freedom of choice as to what carrier or carriers they should elect to patronize in connection with subsequent shipments.

And in *Contract Routing Restrictions*, 2 U.S.M.C. 220, 226, the Board declared that "[e]quality of treatment is not accorded the shipper merely by giving him the opportunity to enter into discriminatory contracts in the same manner as offered to all shippers."

The course of Board decision on dual rate proposals, which has been a vacillating one, is summarized in the brief in opposition filed by respondent Isbrandtsen at pp. 16-17.

may not be permitted to take effect, over the objections of interested parties, without a hearing. As stated above, section 15 was drawn inclusively so that immunity from the antitrust laws would be accorded only in cases where there was a specific showing meeting the statutory requirements and standards. Unless the language relating to "every agreement" is to be drained of all meaning, it must be held to control this case.

The very procedure required by the Court of Appeals' decision was adopted by the Board in September 1952 (only three months before the Board's order in the present case) in dealing with a dual rate proposal filed by the North Atlantic Continental Freight Conference. The Board stated in that case (*Contract Rates—North Atlantic Continental Freight Conference,* Docket No. 724, slip opinion, p. 10):

> The decision in *Isbrandtsen* v. *United States,* 96 F. Supp. 883, as affirmed by the Supreme Court, necessarily has had its impact on the practices of the Board. Unless the Board is fully advised in respect to the spread between dual rates, it cannot be sure that the spread is not arbitrary and the system free of discrimination. * * *
>
> * * * * *
>
> For the carriers to put the dual rate system into effect prior to the completion of our inquiry would, in our judgment, operate to the detriment of the commerce of the United States.

The Board's General Order 76 (R. 78-81) plainly contemplates the scrutiny of all dual rate proposals. To give them full consideration in advance of their taking effect will work no undue burden on the Board. The statute requires no less.

5. It follows, we believe, from what has been stated above that the Court of Appeals was not powerless to grant injunctive relief. As Judge Bazelon stated, the order permitting the institution of the system "virtually removed Isbrandtsen from the shipping market involved" (R. 256). This "action was just as determinative of Isbrandtsen's rights as it would have been had the Board specifically and affirmatively approved the dual rate system agreement in accordance with the statutory requirements * * *" (*ibid.*). The jurisdiction of the lower court is fully sustained by this Court's dismissal of the appeal from the injunction issued in the prior *Isbrandtsen* litigation discussed *supra*, pp. 10-12.[13] And see, also, *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 416; *Stack* v. *Boyle*, 342 U. S. 1, 6; *Algonquin Gas Transmission Co.* v. *Federal Power Commission*, 201 F. 2d 334, 338 (C. A. 1).

Petitioners seek comfort from cases like *Carlsen* v. *United States*, 107 F. Supp. 398 (S. D. N. Y.),

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[13] Judge Fahy's dissent (R. 260) takes the view that Isbrandtsen should have sought equitable relief in a district court. This position appears irreconcilable with this Court's holding in the prior *Isbrandtsen* litigation, since the injunction there was issued by a three-judge, not by a single-judge, district court. As pointed out *supra*, note 5, the Act of December 29, 1950, transferred review of Federal Maritime Board orders from three-judge district courts to courts of appeals.

which held that a refusal by the Interstate Commerce Commission to suspend tariffs filed by certain interstate bus carriers was not reviewable. The difference between that situation and the instant one goes to the roots. Tariffs filed by a carrier with the Interstate Commerce Commission have an effect equivalent to law *until declared unlawful* by the Commission (*Western Union* v. *Esteve Bros.*, 256 U. S. 566; *Boston & Maine Railroad* v. *Hooker*, 233 U. S. 97); agreements between water carriers providing for joint action (and, similarly, agreements between rail carriers to act in concert, see Interstate Commerce Act, section 5a, 49 U. S. C. (Supp. V) 5b) are explicitly declared by statue to be *unlawful until approved.* It was the imminent effectuation of an *unlawful agreement*—one which threatened to create a monopoly in the trade—which the Court of Appeals enjoined in this case. This was done, as in the earlier *Isbrandtsen* litigation, not by way of interference with the primary jurisdiction of the Board, but to preserve the *status quo* pending the exercise of primary jurisdiction in the manner required by statute.

CONCLUSION

The decision below conforms fully to decisions of this Court and is plainly correct. There is no conflict in the circuits. The petitions should be denied.

Respectfully submitted,

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MAY, 1954.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 700

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, *et al.*, *Petitioners,*

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., and EZRA TAFT BENSON, SECRETARY OF AGRICULTURE, *Respondents.*

No. 703

FEDERAL MARITIME BOARD, *Petitioner,*

v.

UNITED STATES OF AMERICA and ISBRANDTSEN COMPANY, INC., *Respondents.*

BRIEF IN OPPOSITION BY RESPONDENT ISBRANDTSEN COMPANY, INC., TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 700

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, *et al.*, *Petitioners*,

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., and EZRA TAFT BENSON, SECRETARY OF AGRICULTURE, *Respondents*.

No. 703

FEDERAL MARITIME BOARD, *Petitioner*,

v.

UNITED STATES OF AMERICA and ISBRANDTSEN COMPANY, INC., *Respondents*.

BRIEF IN OPPOSITION BY RESPONDENT ISBRANDTSEN COMPANY, INC., TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.[1]

OPINION BELOW.

Petitioners, the Japan-Atlantic and Gulf Freight Conference and the Federal Maritime Board, have applied

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[1] This Brief in Opposition by Respondent Isbrandtsen Company, Inc., is addressed to the petitions for certiorari in both No. 700 and No. 703.

for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered on January 21, 1954 (R. 261). The opinion of the Court of Appeals (R. 248) by Bazelon, J. (Prettyman, J., concurring; Fahy, J., dissenting) has not been reported.

JURISDICTIONAL STATEMENT.

The judgment of the Court of Appeals was entered on January 21, 1954 (R. 261). Both petitions for certiorari were filed on April 20, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1) and 5 U. S. C. § 1040.

STATUTES INVOLVED.

The statutes involved are the Shipping Act, 1916, as amended, 39 Stat. 728, 46 U. S. C. § 801, *et seq.*, specifically Section 15 of that Act, 46 U. S. C. § 814, and the Review Act of 1950, 64 Stat. 1129, 5 U. S. C. § 1031, *et seq.*, colloquially known as the Hobbs Act. The applicable statutes are reprinted in the Appendices to the Petitions.

COUNTERSTATEMENT OF THE CASE.

A. Proceedings Before the Federal Maritime Board.

Respondent, Isbrandtsen Company, Inc., is an American-flag carrier by water engaged in transporting freight east-bound from Japan, Korea, and Okinawa to ports on the Atlantic coast of the United States (R. 1). Isbrandtsen competes for cargo on this route with Petitioner, the Japan-Atlantic and Gulf Freight Conference (hereinafter Conference), a voluntary association of seventeen common carrier steamship lines, of which twelve are foreign flag lines and five United States registered lines (R. 2, 60-61). The constitutive agreement under which the Conference operates was first approved in 1934 by the United States Maritime Commission

(predecessor of the Board) under Section 15 of the Shipping Act, 1916, 46 U. S. C. § 814 (R. 222). This agreement, as amended, authorizes the member lines jointly to establish and maintain freight rates, applicable only to traffic transported in vessels owned, controlled, or operated by themselves (R. 223). The conference agreement, however, provides that "there shall be no undue preference or advantages nor unjust or unreasonable discrimination nor unfair practices" against any shipper (R. 225). It further prohibits Conference lines from giving "special rates or other special privileges or advantages not offered to all shippers shipping under similar conditions" (R. 226). The conference agreement as amended contains no express authorization to employ an exclusive patronage system. Isbrandtsen is not a party to the agreement and is not a member of the Conference.

On December 24, 1952, the Conference filed with the Board a statement, pursuant to Board General Order 76,[2]

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[2] General Order 76, 46 Code Fed. Regs. part 236 (Cum. Supp. 1952) provides in pertinent part:

"3. Steamship freight conferences proposing to establish contract/non-contract rates to become effective after the effective date of this rule shall file with the Federal Maritime Board at least 30 days prior to the initiation of such rates, a statement containing:

"(a) The amount of the spread or differential in terms of percentages or dollars and cents;

"(b) The effective date;

"(c) The reasons for the use of contract/non-contract rates in the particular trade involved, and the basis for the spread or differential between such rates; and

"(d) Copies of the form of all contracts pertaining thereto.

• • •

"6. All information filed pursuant to this rule shall be available for inspection by interested parties at the Regulation Office of the Board. A notice of the filing of the statement required under paragraphs 2 and 3 above will be published in the Federal Register as soon as practicable. Except as may be otherwise provided in cases arising under Paragraph 4 above, interested parties shall have twenty

proposing initiation of an exclusive patronage system[3] in the Japan-Atlantic trade commencing January 23, 1953 (R. 82). Under the proposed system, shippers refusing to contract in writing to employ Conference lines exclusively would be charged for the identical transportation service, tariffs 9½ percent higher than the tariffs charged shippers who executed exclusive patronage agreements (R. 3, 82). Shippers executing the agreement who thereafter patronized Isbrandtsen would be required to pay the Conference as liquidated damages a sum in the amount of fifty percent of the freight charge that would have been payable if such shipment had been made in a conference vessel (R. 137). Because, as the Court below observed (R. 251), "Isbrandtsen, carrying slightly less than one-third of the total volume of trade on the Japan-Atlantic route, is the only non-member line competing with the Conference vessels, the impact of this system upon Isbrandtsen is readily apparent."

Notice of filing of the Conference statement was published by the Board in the Federal Register on December 21, 1952 (R. 220). Thereafter, Isbrandtsen and the Attorney General[4] seasonably filed with the Board written state-

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(20)days after the date of such publication within which to submit written comments relating to the information filed with the Board pursuant to this rule. Said comments may include a statement of position with respect to approval, disapproval or modification, together with a request for hearing, should such a hearing be desired."

[3] The exclusive patronage system is variously referred to in the opinion below and in the Petitions as a "contract/non-contract" or as a "dual rate system".

[4] The Departments of Justice, Agriculture and Commerce have contended in various proceedings that the exclusive patronage system is illegal under the Shipping Laws and the Antitrust laws. Docket 648, *Matter of Pacific Coast European Conference*, 3 U. S. M. C. 11 (1948); Docket 684, *Isbrandtsen* v. *North Atlantic Continental Freight Conference*, 3 F. M. B. 235 (1950), rev'd. *sub. nom Isbrandtsen* v. *United States*, 96 F. Supp. 883 (S. D. N. Y. 1951); *United States* v. *Far East Conference*, 342 U. S. 570; Docket 725, *North Atlantic Continental Freight Conference* (pending).

ments in which they challenged the legality under the Shipping Act of the proposed system, the adequacy of the supporting statement by the Conference, and the validity of the 9½ percent differential (R. 140, 215). Both requested a hearing and they asked the Board forthwith to postpone initiation of the system pending a hearing (R. 142, 215).

On January 21, 1953, the Board granted the motions of Isbrandtsen and the Attorney General for a hearing prior to approval but denied the motions to halt initiation of the system pending approval (R. 220). The Board thereby permitted the system to become effective within 48 hours.

B. Proceedings in the Court of Appeals.

On January 22, 1953, the day following entry of the foregoing order, Isbrandtsen filed a Petition for Review in the Court below (R. 1). The Petition alleged that the proposed system could not lawfully be effectuated under the Shipping Act without prior Board approval; that in approving agreements the Board was required by statute to make certain findings which could not properly be made without a hearing; and that initiation of the system pursuant to the Board order threatened Petitioner with exclusion from a trade in which it had been engaged for many years (R. 4-6). A temporary stay of the Board order was granted and on March 23, 1953, the Court of Appeals granted an interlocutory injunction staying so much of the Board order as purported to permit the institution of the exclusive patronage system (R. 239).[5] Petitions for certiorari by the Conference and the Board to review this decree were denied by this Court. 345 U. S. 975.

Thereafter the Secretary of Agriculture, one of the largest shippers in foreign commerce, intervened in opposition to the Board order (R. 243). The United States, a

[5] Nothing in this interlocutory injunction purported to interfere with the orderly progress of the Board's hearing which proceeded before an examiner while this review action was pending.

statutory defendant under 5 U. S. C. § 1037, likewise opposed the Board's order.

The interlocutory injunction was made permanent in the judgment entered on January 21, 1954 (R. 261). The Court set aside the Board order "so far as it allows the institution of the proposed exclusive patronage contract/non-contract dual rate system" prior to its approval, and the Conference was "enjoined from acting pursuant to said proposed exclusive patronage contract/non-contract dual rate system until and unless said system is approved" by the Board (*Ibid.*).

In an opinion by Bazelon, J., (Prettyman, J., concurring) the Court held

> "that the action of the Board in allowing the dual rate system agreement to go into effect prior to approval is a final order within the meaning of the judicial review statute, and that it is contrary to the specific requirement of § 15 of the Shipping Act making Board approval a necessary condition precedent to initiation of such an agreement" (R. 259).

Fahy, J., dissented on jurisdictional grounds (R. 259). He did not construe the Board order as final, and he stated that if effectuation of the system without Board approval were unlawful, equitable relief should be sought against the Conference in the District Court.

QUESTIONS PRESENTED.

1. Whether an agreement by a conference of common carriers by water to institute an exclusive patronage system may become operative in the absence of prior approval by the Federal Maritime Board under Section 15 of the Shipping Act, 46 U. S. C. § 814.

2. Whether, in the circumstances of this case, an order of the Federal Maritime Board permitting an exclusive patronage system to become effective prior to approval was reviewable by the Court of Appeals.

ARGUMENT.

Introduction.

This is not a rate case. The Board's order, itself, makes abundantly clear that there is involved only "the initiation of the proposed contract/non-contract rate *system*" (R. 8) (emphasis supplied throughout). Indeed, the proposed shippers contract which Isbrandtsen attacked before the Board, incorporates no specific rates at all (R. 136-139), but only the threat of a procedure pursuant to which an arbitrary differential will be applied between whatever particular rates the Conference may set in the future. Thus the case does not involve, as Petitioners imply, the validity or justification of particular rates on particular commodities set by the Conference in pursuance of their rate making authority under the basic conference agreement.

The question is not whether the Federal Maritime Board must accord prior approval to a proposal by the Japan-Atlantic Conference to charge $50 instead of $45 per ton for tuna fish. Rather, this case concerns a dramatic shift from a *standard* of rate-making that applies a single rate *uniformly* to all shippers receiving the same transportation service to a standard that applies dual rates *non-uniformly* to shippers receiving the same transportation service. The issue, therefore, is whether, consistently with Section 15 of the Shipping Act, the Conference can institute, *without prior Board approval,* a new *system,* a different *principle* of rate making, which the Board has "frankly recognized as a device tending towards the monopolization of ocean commerce in particular trades by the members, collectively, of conferences which serve those trades". *Isbrandtsen* v. *United States,* 96 F. Supp. 883, 888 (S. D. N. Y. 1951), aff'd. 342 U. S. 950. Applying the "clear language of Section 15 of the Shipping Act" (R. 259) the Court of Appeals concluded that an exclusive patronage system cannot be made effective without prior Board sanction.

Petitioners seek to transmogrify this narrow ruling into a sweeping decision that "*all* rate revisions" and "*every* rate change proposed by a conference" require prior Board authorization (Conf. Pet. 13, 14; Bd. Pet. 24). As we shall show, there is not the slightest warrant for so construing the carefully drafted opinion of the Court below. The decision of the Court of Appeals is clearly correct; it involves merely the straightforward application of an unambiguous statutory provision; it is not unprecedented; and it presents no conflict with decisions of this Court or with the decisions in other circuits. Certiorari is, accordingly, not warranted in this case.

I. The Court of Appeals Correctly Held That the Shipping Act Requires Prior Board Approval of the Exclusive Patronage System.

1) *Section 15 Expressly Requires Prior Sanction.* The most striking thing about the Conference petition is the eloquent silence with which it treats the pertinent statutory provision. Section 15 of the Shipping Act, 46 U. S. C. § 814, requires "every common carrier" to file with the Board a copy of "every agreement" with another carrier or person (1) "fixing or regulating transportation rates or fares", or (2) "giving or receiving special rates, accommodations, or other special privileges or advantages"; or (3) "controlling, regulating, preventing, or destroying competition". Agreements are comprehensively defined to include "understandings, conferences and arrangements." Section 15 further provides:

> "*All agreements,* modifications, or cancellations made after the organization of the Board shall be lawful *only when and as long as approved by the* board, and *before approval* or after disapproval, it shall be unlawful to carry out in whole or in part, directly or indirectly any such agreement, modification, or cancellation."

It follows that an agreement establishing an exclusive patronage system—which relates to the regulation of rates,

which gives special rates or advantages, and which is designed to effect a boycott of non-conference lines thereby "destroying competition"—is lawful "only when * * * approved". The Court of Appeals correctly so held.[6]

2. *The Board Did Not Authorize the System in Approving the Organic Agreement in 1934.* The Petitioners maintain that "in approving the organic agreement, the Board regarded its approval as authorizing the establishment of a rate making machinery whereby the conference could establish rates, including contract/non-contract rates" (Bd. Pet. 19; Conf. Pet. 3-4). In other words, Petitioners contend that when the Board approved the constitutive conference agreement in 1934 (p. 3, *supra*), it thereby sanctioned use of a particular exclusive patronage system in 1954. The short answer is that the "organic agreement" (R. 222) contains no provision authorizing an exclusive patronage system.[7] As the Court of Appeals put it, the system "introduces an entirely new scheme of rate combination and discrimination not embodied in the basic agreement" (R. 257).

The Board relies upon the provision in the organic agreement authorizing the "establishment, regulation and maintenance of agreed rates and charges" (Bd. Pet. 18; R. 223). But this general rate making power is qualified by a proviso in the agreement that forbids the conference to give "special rates or other special privileges or advantages not offered to all shippers shipping under similar condi-

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[6] The canon that plain meaning should be given effect, *United States* v. *Sullivan*, 332 U. S. 689, 693, is reinforced in this case because agreements approved by the Board pursuant to Section 15 are made exempt by that section from the antitrust laws, and such exemptions are strictly construed. *United States* v. *Borden Co.*, 308 U. S. 188, 201.

[7] Compare the North Atlantic Continental Freight Conference agreement in *Isbrandtsen Co.* v. *United States*, 81 F. Supp. 544 (S. D. N. Y. 1948), appeal dismissed 336 U. S. 941, which expressly provided that "The conference may provide specific contract and non-contract rates * * *." 81 F. Supp. at 545.

tions" (Bd. Pet. 19; R. 226). The Conference now proposes to charge different rates for the same transportation service to shippers identically situated, not on the basis of differences in cost, tonnage or shipments, but on the sole consideration that the shipper not patronize any non-conference carrier. The proposed system thereby manifestly accords a special privilege to some shippers in derogation of the conference agreement.[8] It follows that in approving the organic agreement the Board not only did not authorize the exclusive patronage system, but, indeed, explicitly outlawed the invidious discrimination implicit in the system.

There is yet another vice in the contention that approval of the basic conference agreement constituted approval of an exclusive patronage system. Such a system is invalid if the spread between the contract and non-contract rates is arbitrary.[9] It can scarcely be maintained that the Board approved a 9½ percent spread when it sanctioned the basic agreement in 1934, for at that time no one knew when, if ever, the Conference would undertake to institute a contract system or what, if any, spread between the dual rates it would undertake to employ. The Board first received notice of the spread in rates involved here when the Conference filed a statement pursuant to General Order 76 on December 24, 1952 (R. 82). The Board clearly could not have approved in 1934 a spread between rates not proposed or called to its attention until 20 years later.

Certainly the Board will scarcely be heard to say that when it approves a basic conference agreement it sanctions whatever practice the Conference may thereafter devise, however, discriminatory or arbitrary that practice may be. Such a view would constitute the height of admin-

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[8] This Court has characterized an identical exclusive patronage system as "prima facie discriminatory". *Swayne & Hoyt* v. *United States*, 300 U. S. 297, 303.

[9] "Dual rate provisions which authorize arbitrary differentials are obviously not reasonable" and "provisions which permit such rates are invalid". *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883 (S. D. N. Y. 1951), aff'd. 342 U. S. 950.

istrative irresponsibility—to be contrasted with the view of Commissioner Aitchison of the Interstate Commerce Commission that an administrative agency would "create an injustice * * * by omitting to inform itself and by acting ignorantly when intelligent action is possible". *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883, 892 (S. D. N. Y. 1951). And as the Civil Aeronautics Board has stated in construing analogous statutory provisions which confer an exemption from the antitrust laws to inter-carrier agreements approved by the CAB:[10]

> "Section 412(b) of the Civil Aeronautics Act requires that we shall approve specific agreements to accomplish such purposes only *after careful scrutiny to determine that the provisions of any such arrangement adequately protect the public interest involved.*" Agreement Establishing Air Cargo, Inc., 5 CAB 468, 469 (1948).

3. *Petitioners Distort the Ruling Below.* Petitioners seek to escape the "clear language" of Section 15 with a parade of imaginary horribles. Thus, the Board argues that the "reasoning of the Court below, carried to its *strictly logical* conclusion would seem to dictate the need for separate prior approval for *all* rates of conferences, as well as contract/non-contract rates" (Bd. Pet. 24). It complains that the decision below will "thrust upon the Board an intolerable

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[10] Section 412 of the Civil Aeronautics Act, 49 U. S. C. § 492, requires every carrier to file with the Board certain specified agreements. "The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest or in violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter." Agreements so approved are exempt from the antitrust laws. 49 U. S. C. § 494. Construing these sections, the Board has accorded prior approval to agreements covering rates, forms of tickets, terms of carriage, and the like. See *Resolution of North Atlantic Traffic Conference*, 6 CAB 845 (1946); *IATA Traffic Conference Resolution*, 10 CAB 783 (1945).

burden of detail" and that the Board will be "overwhelmed" (Bd. Pet. 17, 23). The Conference likewise contends that the "import of the decision of the court below cannot be limited to contract/non-contract rate situations, for the theory of the decision is equally applicable to *all* rate revisions which may be proposed by a conference" (Conf. Pet. 13). The Board will be required, the Conference states, to "pass upon the thousands of proposals it receives each month" (*Id.* at 14).

These extravagant claims set up a strawman totally unwarranted by anything in the opinion of the Court below. That Court pointedly emphasized that an exclusive patronage system "can hardly be classified as an interstitial sort of adjustment since it introduces an entirely new *scheme* of rate combination and discrimination * * *" (R. 257). The decision below applies not to "day-to-day rate fixing or routine activities by the conference" (Bd. Pet. 12),[11] but to what the Conference concedes to be the "most important competitive tool" employed by the conferences (Conf. Pet. 12). In sum, the Court below concluded only that the Shipping Act compels prior approval of an agreement among carriers to employ the exclusive patronage system and not of the specific rates promulgated thereafter pursuant to the agreement.

Data furnished by the Board in its petition exposes the fanciful character of the "intolerable burden" claims. According to the Board, there are only 105 conferences engaged in foreign commerce and of these 62 employ the exclusive patronage system (Bd. Pet. 21). This is a far cry from the "thousands of proposals" the Conference conjures up (Conf. Pet. 14). Indeed, in a calmer vein, the Conference itself recognizes that "*limiting the decision of the*

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[11] Compare the contrasting view that "so formal and complicated an agreement as is encompassed in conference adoption of a contract system" is clearly distinguishable from a mere "routine" rate change. Brief of Counsel for the Board, Docket 724, F. M. B. *North Atlantic Continental Freight Conference*, September 26, 1952, in which the Board forbade the initiation of the system prior to approval, *infra*, p. 13.

court below to the very facts presented in this case, it means that these freight conferences may not establish contract/non-contract tariffs unless and until proposals to establish the same have been specifically approved by the Board" (Conf. Pet. 11). It is hard to see how the Court of Appeals could have held any less without completely devitalizing the statutory mandate that such agreements "shall be lawful only when and as long as approved".

The Board does not deny that it must accord approval at some stage. Indeed, Board General Order 76 (fn. 2, *supra*) contemplates precisely such approval. Surely it is no more burdensome to approve the system before effectuation than after it has become operative. And because the system is admittedly monopolistic in purpose (p. 23, *infra*) prior approval is particularly imperative if the rights of competing carriers and shippers are not to be irreparably lost. As the Board itself observed in a more responsible moment in preventing the initiation of similar dual rates:

> "[T]he possibility of an arbitrary spread in the dual rates now proposed * * * is of such importance that the status quo of the Conference carriers with respect to dual rates should not be changed pending the completion of the investigation into this matter which we have instituted. For the carriers to put the dual rate system into effect prior to the completion of our inquiry would, in our judgment, operate to the detriment of the commerce of the United States." *Contract Rates, North Atlantic Continental Freight Conference, Docket* 724, 4 F. M. B. 98 (1952).

The Conference claims prior approval should not be required because it is "impractical for the conference to wait final determination by the Board" and that a "rate war has ensued" (Conf. Pet. 13). The record is barren of any reference to an ensuing rate war, and the wisdom of the rule against consideration of matters *dehors* the record is underscored by the Conference contention, which omits relevant particulars and is, therefore, misleading. The

facts—as shown in a "Motion for a Stay" of the lower court's interlocutory decree, filed by the Conference with this Court during the October Term, 1952 [12]—are that the Conference itself deliberately initiated a rate war in an effort to upset the *status quo* which the lower court's interlocutory injunction had sought to preserve. The rate war in this trade was not the result of a sudden "economic crisis" (Conf. Pet. 13); it was instead the end product of cumulative economic forces, including an oversupply of Conference vessels, excessively high conference rates, the postwar resurgence of the Japanese merchant marine, and secret rebates by Conference members.[13] The delay occasioned by Conference compliance with the administrative procedure established by Congress as a condition precedent to an exemption from the antitrust laws was incidental.

In substance, Petitioners are seeking to rewrite the statute. Even if tenable, the arguments that prior approval is "burdensome" and "impractical" have been advanced in the wrong forum. Congress has explicitly provided that such agreements shall be "lawful only when and as long as approved by the Board" and that "before approval * * * it shall be unlawful to carry out * * * any such agreement."

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[12] "Motion for a Stay of the Order Below", *Japan-Atlantic and Gulf Freight Conference, et al.* v. *United States, et al.*, No. 718, October Term, 1952. The motion for a stay was denied, and the Conference petition for certiorari was likewise subsequently denied. 345 U. S. 975.

[13] "The current situation in the Far East [*i.e.*, the 'freight rate warfare'] has been brought on primarily by an increase in the supply of ships, which in turn stemmed from the resurgence of the Japanese Merchant Marine and the postwar rebuilding program of the many foreign ship lines trading with Japan." N. Y. Journal of Commerce, April 23, 1953, cited "Motion for a Stay", *id.*, Exhibit F. The Conference lines lowered rates "to combat the inroads of non-conference, or independent lines, and to curb the tendencies of certain members toward such malpractices as secret rebates. . . . Some conference members ruefully admit that this action to open rates indefinitely 'has smoked out the fact that rates for shippers were far too high.'" N. Y. Journal of Commerce, March 25, 1953, *Id.*, Exhibit B.

Whether agreements shall be lawful absent prior approval is a "matter of policy for Congress to decide". *Civil Aeronautics Board* v. *Summerfield*, 74 S. Ct. 350, 354.

II. The Decision Below Is Neither Novel Nor Conflicting.

1) *The Ruling Is Not Unprecedented.* Petitioners maintain that the decision below is "unprecedented" and a "bold reversal" of a "well established and long standing construction" of Section 15 by the Maritime Board (Conf. Pet. 10; Bd. Pet. 18).

The requirement of prior Board approval or disapproval is established by *Isbrandtsen* v. *United States*, 81 F. Supp. 544 (S. D. N. Y. 1948), appeal dismissed, 336 U. S. 941. In that case, Isbrandtsen brought suit to "enjoin and set aside as much of the orders of the United States Maritime Commission approving conference agreements as authorized imposition by steamship carriers of contract and non-tract rates" (81 F. Supp. at 544). A three-judge statutory court declared in awarding the injunction:

> "We are all in agreement that a temporary injunction should issue to maintain the status quo pending further proceedings ['before the Commission'] to adjudicate the legality of the Conference agreements and the action contemplated pursuant thereto.
>
> * * *
>
> ". . . We should not at this stage pass on the validity of the agreements *before the Commission* in accordance with its established procedure, *has had an opportunity to pass thereon in an adversary proceeding.*" (81 F. Supp. 546).

This was a square holding that an exclusive patronage system could not be effectuated prior to agency approval and judicial review of such agency action. This Court dismissed the appeal from such ruling. 336 U. S. 941.

Petitioners have also overlooked *United States Navigation Co.* v. *Cunard S. S. Co.*, 50 F. 2d 83 (C. A. 2, 1931), aff'd. 284 U. S. 474, where the Court of Appeals (per A.

Hand, J.) said with reference to an identical dual rate system: "As the agreement set forth in the amended bill is alleged not to have been approved by the Board, it is ex vi termini unlawful" (50 F. 2d at 88). The Court added that "the failure to secure the approval of such an agreement" is "forbidden by the Shipping Act" and that the "Board may determine whether any agreement such as is described in the bill has actually been made, and, if it has may order it filed and require the parties to cease from acting under it *unless and until its approval*" (*Ibid.* at 89). Petitioners have further conveniently by-passed *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, where this Court, citing Section 15, stated: "[T]he act requires that if any contract for a change of those rates is made the new rate may be charged only *after* the Board has approved the agreement" (300 U. S. at 146).

(2) *Board Practice In This Field Has Been Inconsistent.* The decisions of the Board in this field "have lacked uniformity and consistency; and, in such circumstances, administrative interpretations have little weight." *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883, 890 (S. D. N. Y. 1951), aff'd. 342 U. S. 950; see *American Surety Co.* v. *Bethlehem Nat. Bank*, 314 U. S. 314, 319. In *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U. S. S. B. 41 (1922), the Shipping Board held that exclusive patronage systems were "unjustly discriminatory" and therefore unlawful Eleven years later, in *Rawleigh* v. *Stoomvart*, 1 U. S. S. B. 285, 290 (1933), the Board indicated that the *Eden* rule applied only to a single carrier and not to a conference agreement. In *Intercoastal Investigation*, 1 U. S. S. B. 400, 452 (1935), the Shipping Board Bureau rejected this distinction. Thereafter, in *Contract Routing Restrictions*, 2 U. S. M. C. 220, 226-227 (1939), the Maritime Commission held that the *Eden* case applied to a conference agreement. More recently, the Board has taken the position that "under some circumstances and with some percentage differentials a dual rate system may be valid." F. M. B. Docket No. 724, *Contract Rates: North Atlantic Continental Freight*

Conference (Jan. 6, 1954). The contrariety of views concerning the inherent legality of the system itself has precluded the growth of a consistent, articulated Board policy concerning the timing of required approval. It follows that the decision below will not require "fundamental revision" in "long practice" (Bd. Pet. 28). Finally, even clear and consistent administrative practice must yield to "clear language" in a Congressional enactment. *Koshland* v. *Helvering*, 298 U. S. 441, 447.

(3) *There Is No. Conflict.* The Conference argues that there is a conflict between the ruling below and the decisions of this court in *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U.S. 474, and *Far East Conference* v. *United States*, 342 U. S. 570. The *Cunard* and *Far East* cases decided that a complaint challenging validity of a dual rate system under the antitrust laws must be presented to the Board before judicial relief is invoked. The Board, in other words, is vested with "preliminary" or "primary original jurisdiction". 284 U. S. 485, 487.[14] But this proceeding is not an original suit under the antitrust laws in the District Court; it is a Petition for Review under the Shipping Act in the Court of Appeals (R. 1). Isbrandtsen preliminarily invoked the primary jurisdiction of the Board; it sought administrative relief in the first instance and it exhausted its administrative remedies.[15] Petitioners would invest the Board with "exclusive" jurisdiction, a result at war with Congressional intent as manifested by the Hobbs Act, *supra*. See Schwartz, *Legal Restriction of Competition In The Regulated Industries: An Abdication of Judicial Responsibility*, 67 Harv. L. Rev. 436 (1954); Jaffe, *Primary*

[14] See Von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 Harv. L. Rev. 929 (1954).

[15] The Conference also claims a conflict (Conf. Pet. 15) with the decision in *S. S. W. Inc.* v. *Air Transport Association*, 191 F. 2d 658 (D. C. Cir., 1951). That case likewise held only that "Appellant must first seek relief from the Board", a course pursued by Isbrandtsen.

Jurisdiction Reconsidered. The Antitrust Laws, 102 Pa. L. Rev. 577 (1954).

The result below is in no way "anomalous" (Conf. Pet. 15). If a Conference files an application with the Board to institute an exclusive patronage system, the Board is required under Section 15 of the Shipping Act to approve or disapprove the application, and its decisions are reviewable in the Court of Appeals under the Hobbs Act, 5 U. S. C. § 1032. On the other hand, as this Court has explained, "if there be a failure to file an agreement as required by Section 15, the Board, as in the case of other violations of the Act, is fully authorized by Section 22, *supra,* (46 U. S. C. A. § 821), to afford relief upon complaint or upon its own motion. Its orders, in that respect, as in other respects, are then, under Section 31 (46 U. S. C. A. § 830) [since superseded by the review provisions of the Hobbs Act, *supra*] for the first time, open to a judicial proceeding to enforce, suspend, or set them aside, in accordance generally with the rules and limitations announced by this Court." *United States Navigation Co.* v. *Cunard S. S. Co.,* 284 U. S. 474, 486.

III. The Court of Appeals Had Jurisdiction to Set Aside the Board Order.

Petitioners challenge the jurisdiction of the Court of Appeals on grounds that the Board order was interlocutory and that the matter was committed to the exclusive discretion of the agency (Bd. Pet. 25-27; Conf. Pet. 18-21). In concluding that it was vested with jurisdiction, the Court of Appeals applied familiar principles to the circumstances of this case and its decision on this score scarcely warrants notice by this Court.

(1) *The Jurisdictional Issue Does Not Warrant Review.* The jurisdictional question has already been settled by this Court adversely to Petitioner's claim. In *Isbrandtsen* v. *United States,* 81 F. Supp. 544 (S. D. N. Y. 1948), a three-judge statutory court (per Rifkind, J.) enjoined effectuation of an exclusive patronage system until such time as the

Board had "an opportunity to pass thereon in an adversary proceeding." *Id.* at 546. An appeal from that judgment was dismissed by this court, *sub nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co., Inc.*, 336 U. S. 941. Petitioners strive to distinguish that case on grounds that "the Board did not then assert the power to afford a party temporary relief against irreparable injury pending consideration of the tariff [*i.e.*, the exclusive patronage system] by the Board" (Conf. Pet. 16). But the want of power in the Board to award temporary relief would not have supplanted a statutory gap in the court's jurisdiction. Contrariwise, the assertion by the Board of power to grant temporary relief does not now divest the court of jurisdiction. Citing *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, the Court below said that reviewability "depends not upon the label affixed to its action by the administrative agency but rather upon a realistic appraisal of the consequences of such action" (R. 255). The Court emphasized that the Board order

> "attaches grave consequences to contractual and other business relations of Isbrandtsen. By denying Isbrandtsen's request to postpone operation of the dual rate system and to grant an immediate hearing, the Board virtually removed Isbrandtsen from the shipping market involved. Whether this removal was temporary or permanent Isbrandtsen would inevitably suffer 'real, immediate and incalculable' harm. The Board's action was just as determinative of Isbrandtsen's rights as it would have been had the Board specifically and affirmatively approved the dual rate system agreement in accordance with the statutory requirements * * *" (R. 256).[16]

[16] In granting the interlocutory injunction, the Court below pointed out that the exclusive patronage system threatened to compel Isbrandtsen to withdraw its ships from the trade, and that even if the system were subsequently held unlawful, Isbrandtsen "would have greatest difficulty in restoring its service because of the impossibility of recovering patronage from those shippers who would have signed such contracts and who would have made forward bookings based on such contracts covering a considerable period of time" (R. 242).

It is familiar learning that agency action which grants or denies a temporary privilege contingent upon further agency action may be immediately reviewable in some circumstances. Thus an order of the Federal Power Commission denying temporary authorization to construct a pipeline,[17] or a certificate of temporary authority to engage in transportation[18] are reviewable determinations. Respondents requests for postponement

> "should be regarded as carved out of the main proceeding and as partaking of the nature of a separate proceeding, in which the Commission was asked * * * to meet an emergency situation pending determination of what might be a protracted main proceeding. The Commission's order * * * finally disposed of that separate, substantive application, and hence we think the order was not 'merely preliminary or procedural' in character but had the necessary degree of finality to be immediately reviewable * * *." *Algonquin Gas Transmission Co.* v. *F. P. C.*, 201 F. 2d 334, 338 (C. A. 1st, 1953) (per Magruder, J.).

The Board order gave the Conference a green light to institute the system before a hearing. Review after a hearing at some indefinite future date would "be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546; see also *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U. S. 327, 334.

(2) *The Court of Appeals Has Exclusive Jurisdiction.* In a brief dissenting opinion, Fahy, J., indicated below that if effectuation of the system were unlawful without prior Board approval, equitable relief might properly be sought

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[17] *Algonquin Gas Transmission Co.* v. *F. P. C.*, 201 F. 2d 334, 338 (C. A. 1st, 1953).

[18] *Braniff Airways* v. *Civil Aeronautics Board*, 147 F. 2d 152 (D. C. Cir. 1945); *Hudson River Day Line* v. *United States*, 85 F. Supp. 225 (S. D. N. Y. 1949).

against the Conference in the District Court (R. 260). But the Hobbs Act vests "exclusive" jurisdiction over Board orders in the Court of Appeals, 5 U. S. C. § 1032, and the Conference, in initiating the system, would purport to act under color of Board authority. Moreover, in *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, this Court stated that in the event of "failure to file an agreement as required by Section 15" the appropriate remedy was a complaint to the Board pursuant to 46 U. S. C. § 821, followed by judicial review, p. 18, *supra*. That was precisely the procedure followed by Isbrandtsen in this case.

(3) *I. C. C. Practice Is Not Analogous.* The Board relies heavily upon those cases which hold that orders of the Interstate Commerce Commission, refusing to suspend rate orders are not reviewable (Bd. Pet. 25). But, as the Court below pointed out, "under the Interstate Commerce Act, rates are effective and lawful merely upon filing" (R. 258). Absent suspension, the carrier-made railroad rates are lawful subject to a post-operative commission veto. See *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487, 493 (E. D. Va., 1935). "In marked contrast", under the Shipping Act, "orders with respect to agreements [are] unlawful until approved" (R. 258). A statutory scheme which makes rates *lawful until disapproved* differs *toto coelo* from a statute which makes agreements *unlawful until approved.*

None of the decisions cited in the Conference petition derogate from the conclusion that the Board order here was reviewable. The ICC valuation order in *United States* v. *Los Angeles R. R.*, 273 U. S. 299 (cited Conf. Pet. 19) was held non-reviewable for the reason that it was "not a step in a pending proceeding" but "merely preparation for possible action in some [future] proceeding * * *". 273 U. S. at 310. Reliance by the Conference upon *Petroleum Co.* v. *Comm'n.*, 304 U. S. 209, and *Myers* v. *Bethlehem*, 303 U. S. 41, is curious, because in those cases plain-

tiffs sought to *enjoin* an investigation or hearing; here Isbrandtsen sought to compel the Board to *grant* a hearing before approval. The recent Court of Appeals decision in *Columbia Broadcasting System* v. *F. C. C.*, ... F. 2d ..... (D. C. Cir., March 11, 1954) (Conf. Pet. 31) is plainly not inconsistent. In that case, the Commission granted a construction permit and authority to make program tests to Station KBIG. The Commission thereafter refused to grant a CBS petition to enjoin the program testing pending hearing on KBIG's application for a license. The Court sustained this ruling on the grounds that the permits had been granted upon notice "and without objection" and that CBS had failed "to allege such economic injury as would warrant the immediate relief requested."[19]

(4) *The Finding Of Injury Had a Realistic Basis.* Petitioners also challenge as erroneous the finding of the Court of Appeals after hearing that Isbrandtsen would suffer "real, immediate, and incalculable harm" (R. 256), although the Board purported to make a contrary finding without a hearing (R. 221). Passing the fact that such a determination has traditionally been a judicial and not an administrative function, the jurisdiction of the Court of Appeals under the Hobbs Act to review agency orders does not depend upon irreparable injury; jurisdiction in such cases is conferred to protect persons who are "aggrieved". 5 U. S. C. § 1034. The Court's conclusion was fully warranted. Data filed by the Conference with the Board in support of its proposal to initiate the system showed that between June 1951 and September 1952, the Conference carried 69.7 percent of the cargo in this trade

[19] Conference reliance upon *Seaboard & Western Airlines* v. *Civil Aeronautics Board*, 181 F. 2d 515 (D. C. Cir., 1949) (Conf. Pet. 20) is likewise misplaced. Since the temporary mail rates, if excessive, would be retroactively lowered, thereby precluding the carriers from using the excess to subsidize their operations, there was no danger of injury to the petitioner.

(R. 132). The Board has acknowledged in other judicial proceedings that:

> "The contract system should be frankly recognized as a device tending towards the monopolization of ocean commerce in particular trades by members, collectively, of conferences which serve those trades. * * * If a contract system is wholly effective it will result in a complete monopoly in the sense that all cargo moving in a trade where the system is used, will move in ships of conference carriers. Necessarily, in these circumstances, there would be no service by independent operators." *Isbrandtsen* v. *United States*, 96 F. Supp. 883, 888 (S. D. N. Y. 1951), aff'd. 342 U. S. 950.

IV. Certiorari Should Not Be Granted at This Stage Because Proceedings Are Pending Before the Board.

One further factor, ignored by Petitioners, tends to militate against grant of the writ at this time. As the Court of Appeals noted, the "interlocutory injunction did not affect the Board's grant of a hearing after institution of a dual rate system agreement" (R. 254). Nor did the final decree interfere with the administrative hearing. Proceedings are now pending before the Board to determine if the exclusive patronage system proposed by the Japan-Atlantic Conference is lawful under the Shipping Act (F. M. B. Docket No. 730). Hearings have been concluded and briefs are scheduled to be filed with the Examiner on May 24, 1954. If the Board concludes that the proposed system is prohibited by statute, and if that determination is sustained on review, the Conference will have no grounds for protest. It would be irrelevant whether prior or subsequent approval were mandatory if the system were inherently defective.

CONCLUSION.

This case has been characterized throughout by unseemly haste on the part of the Petitioners. The Board sought to permit initiation of this system without even the shadow of a prior approval, not to mention the substance of a prior hearing. The Conference then vainly attempted to secure certiorari from this Court to review an interlocutory injunction while the hearings were proceeding in regular order before the Board. And now Petitioners seek review here while the hearings are approaching their conclusion before the Board. Petitioners thus seek to anticipate the construction of a full record on the basis of which this Court may fruitfully and intelligibly examine the regulatory scheme for the protection of shippers, carriers, and the public which Congress embodied in the Shipping Act of 1916.

For the reasons stated, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 700

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., AND EZRA TAFT BENSON, SECRETARY OF AGRICULTURE

No. 703

FEDERAL MARITIME BOARD, PETITIONER

v.

UNITED STATES OF AMERICA AND ISBRANDTSEN COMPANY, INC.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF AGRICULTURE IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 248–260) is reported in 211 F. 2d 51.

JURISDICTION

The judgment of the Court of Appeals (R. 261) was entered on January 21, 1954. The petitions for writs of certiorari were filed on April 20, 1954. The jurisdiction of this Court is invoked under 5 U. S. C. 1952 ed. § 1040 and 28 U. S. C. 1952 ed. § 1254 (1).

QUESTIONS PRESENTED

An agreement by the Japan-Atlantic and Gulf Freight Conference was submitted to the Federal Maritime Board on December 24, 1952, and the terms of the agreement provide for a dual rate or penalty system whereby the Conference lines charge 9½% higher rates to a shipper who does not contract to give all of his business to the Conference lines. On January 21, 1953, the Board, without prior hearing and over the objections of a non-Conference line and the United States, issued an order which permits the Conference lines to use the dual rate or penalty system pending the outcome of an administrative proceeding. The Board reserved for consideration at a future hearing the protests filed by the United States and the non-Conference line, but the use of the dual rate or penalty system during the present period is not within the compass of the hearing, and the post-hearing decision will be prospective—and not retroactive—in application. The Court of Appeals set aside the Board's order insofar as it permitted the system to go

into operation without the prior approval required by § 15 of the Shipping Act, and the Court enjoined the Conference carriers from employing the system in the absence of such approval. The following questions are presented:

1. Whether an agreement by a Conference of water carriers to adopt a dual rate system is an agreement within the meaning of § 15 of the Shipping Act, and is accordingly illegal unless and until approved by the Board as consistent with the criteria set forth in the Shipping Act.

2. If so, whether the Court of Appeals is authorized to grant injunctive relief preventing the effectuation of the agreement pending an administrative hearing and determination of the objections of the protesting parties.[1]

STATUTES INVOLVED

The relevant provisions of the Shipping Act (39 Stat. 728, as amended, 41 Stat. 996, 49 Stat. 1518, 46 U. S. C. 1952 ed. § 801 *et seq.*) and the relevant provisions of the so-called Hobbs Act (64 Stat. 1129, 5 U. S. C. 1952 ed. § 1031 *et seq.*) are set forth in the Appendix, *infra,* pp. 11–15.

STATEMENT

The order of the Federal Maritime Board authorizes and permits the institution, effective

[1] The question as to whether the dual rate or penalty system is prohibited by § 14 of the Shipping Act and hence not susceptible of approval by the Board under § 15 of the Shipping Act was not resolved by the Court of Appeals.

January 23, 1953, of an exclusive patronage contract or dual rate system by the petitioners, the Japan-Atlantic and Gulf Freight Conference. Under the dual rate system, a shipper agreeing to forward by Conference vessels "all shipments made directly or indirectly by him, his agents, subsidiaries, associated or parent companies, from Japan, Korea and Okinawa to United States Gulf Ports and Atlantic Coast Ports of North America, whether such shipments are made C. I. F., C. & F., F. O. B., ex godown or by any other terms" receives the benefit of the contract rate, which is 9½ percent less than the non-contract rate (R. 60–63, 6). Any shipper who refuses to boycott non-Conference carriers is required, when shipping on Conference lines, to pay 9½ percent higher than the exclusive patronage contract rate for identical services. Any shipper who violates the exclusive patronage contract by making a single shipment with any non-Conference carrier is required to pay as liquidated damages to the Conference "fifty per-centum (50%) of the amount of freight which the Shipper would have paid had such shipment been made in a vessel of the [Conference] Carriers at the Contract rate currently in effect" (R. 61). If any shipper violates the exclusive patronage contract more than once during any period of twelve months, his contract with the Conference will be cancelled and he will not be

permitted to enter into a new agreement until the liquidated damages have been paid in full (R. 61).

The Conference filed with the Board, on December 24, 1952, a statement proposing the adoption of the exclusive patronage contract or dual rate system, and the United States and a non-Conference line, i. e., Isbrandtsen Company, Inc., promptly filed protests with the Board urging that the proposal was unreasonable, retaliatory, unjustly discriminatory, and illegal under the Shipping Act, and should be disapproved, and requesting that its effective date be suspended pending the conduct of a full hearing (R. 64–104, 139–143). But the Board, without having conducted a hearing, entered the order under review on January 21, 1953 (R. 221), denying the protestants' requests and permitting the Conference lines to use the dual rate or penalty system pending the outcome of an administrative hearing, and such hearing is not with respect to the use of the dual rate system during the present time inasmuch as the post-hearing decision will be prospective—and not retroactive—in application.

Isbrandtsen thereupon instituted review proceedings in the Court of Appeals. The United States was named as respondent, and the Secretary of Agriculture intervened pursuant to an order of the Court of Appeals. The Court of Appeals issued its opinion on January 21, 1954,

holding that the Conference agreement to adopt the dual rate system was an agreement which must be submitted to the Board under § 15 of the Shipping Act, and that such agreement is illegal unless and until approved by the Board, and that the Board's action in permitting the dual rate system to become effective in advance of a hearing and determination under § 15 of the Shipping Act was unauthorized, and that such action by the Board was immediately reviewable (R. 248). The Court's judgment (R. 261) restrains the effectuation of the Conference proposal pending a determination by the Board relative to its legality in conformity with § 15 of the Shipping Act.

INTEREST OF THE SECRETARY OF AGRICULTURE

The Secretary of Agriculture intervened in this case (1) to represent the interests of the agricultural community in obtaining equitable transportation rates and services for shipments of agricultural products,[2] and (2) to represent the Department of Agriculture's direct interest as a large shipper of agricultural commodities.

---

[2] Under § 203 (j) of the Agricultural Marketing Act of 1946 (7 U. S. C. 1952 ed. § 1622 (j)), the Secretary is authorized and directed to assist in obtaining equitable and reasonable transportation rates and services for agricultural products by, *inter alia*, making complaint to the Federal Maritime Board and to other Federal and State transportation regulatory bodies.

The issue as to the validity of the dual rate system is of basic and widespread importance with respect to the transportation of agricultural products. For example, approximately 27 million tons of agricultural products were exported by ocean carriers in 1951.[3] It is important to the agricultural industries and to the Department of Agriculture that shipping rates be competitive and reasonable so as to encourage and favor the exportation of American agricultural products. If the Conference lines can coerce shippers into discontinuing to patronize the non-Conference lines, and thereby eliminate non-Conference competition, then the economic freedom of bargaining of shippers becomes a nullity—having no place else to go, the shippers must accept Conference rates.

With a complete monopoly of the trade, the Conference lines would have the economic power to charge much higher rates than would be possible with the check of independent competition. The recourse of appealing excessively high rates to the Maritime Board, which may disapprove the Conference agreements, is not an adequate remedy for shippers. Such recourse would probably involve protracted hearings as to the excessiveness of the rates and require the hiring

[3] Computed from Commercial Statistics, Water-Borne Commerce of the United States for the Calendar Year 1951, Department of the Army, Annual Report of the Chief of Engineers, 1952, Part 2, Table 2, pp. xx–xxv.

of counsel to present the shipper's case.[4] It could not be as effective in curbing excessive rates as independent competition.

The position of the Secretary is that shippers of agricultural products should be free to bargain with both the Conference and non-Conference lines and thereby obtain the cheapest rates available—and obtain them without being penalized for patronizing the non-Conference lines. Congress, in enacting the Shipping Act, 1916, did not intend to sanction the destruction of free competition in ocean shipping, but sought rather to guarantee to shippers both the economic freedom of bargaining and the right of equal treatment.

ARGUMENT

The statement which the Conference filed with the Board in December 1952 was a memorandum of an agreement by the members of the Conference to adopt, on a certain date, the exclusive patronage or dual rate system. The term "agreement" in § 15 of the Shipping Act "includes un-

[4] The Alexander Committee recognized, on page 306 of its Report (H. R. Doc. No. 805, 63rd Cong., 2d Sess., 1914), that:

"Conference lines, through their monopolistic powers, so completely dominate the shippers with whom they deal that these shippers cannot afford, for fear of retaliation, to place themselves in a position of active antagonism to the lines by openly giving particulars of their grievances. * * * Shippers, on the contrary, live far apart and because of their different and frequently antagonistic interests can only combine for mutual protection with the greatest difficulty."

derstandings, conferences, and other arrangements," and every common carrier by water subject to the Act is required to file with the Board "a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; * * * or in any manner providing for an exclusive, preferential, or cooperative working arrangement" (46 U. S. C. 1952 ed. § 814). The dual rate system is manifestly "an agreement" within the definement of that term in § 15 of the Shipping Act, and a dual rate proposal must be specifically and independently considered, in accordance with proper administrative proceedings, before it can have any claim to legality. *Isbrandtsen Co.* v. *United States,* 81 F. Supp. 544 (S. D. N. Y.), appeal dismissed *sub nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen,* 336 U. S. 941.

The brief for the United States, in opposition to the petitions for certiorari, gives reasons which, we believe, warrant the conclusion that the petitions should be denied, and we adopt, on behalf of the Secretary of Agriculture, the argument in the brief for the United States.

CONCLUSION

It is respectfully submitted that the petitions for the writs of certiorari should be denied.

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NEIL BROOKS,
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MAY 1954.

APPENDIX

The following are the relevant provisions of the Shipping Act, 1916, 39 Stat. 728, as amended, 41 Stat. 996, 49 Stat. 1518, 46 U. S. C. 1952 ed. § 801 *et seq.*:

> SEC. 14. That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—
>
> First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term "deferred rebate" in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.
>
> Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this Act means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing or reducing

competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense (46 U. S. C. 1952 ed. § 812).

SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the * * * Board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or

traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.

All agreements, modifications, or cancellations made after the organization of the * * * [Board] shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be ex-

cepted from the provisions of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and Acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government and for other purposes," and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action (46 U. S. C. 1952 ed. § 814).

SEC. 16. That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever (46 U. S. C. 1952 ed. § 815).

* * * * *

SEC. 17. That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors.

> Whenever the * * * Board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge (46 U. S. C. 1952 ed. § 816).

The following is the relevant provision of the Act of December 29, 1950, 64 Stat. 1129, 5 U. S. C. 1952 ed. § 1031 *et seq.*:

> SEC. 2. The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of * * * (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916, as amended (5 U. S. C. 1952 ed. § 1032).

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MAY 26 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States.

OCTOBER TERM, 1953.

No. 700.

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE; MITSUI STEAMSHIP CO., LTD.; KAWASAKI KISEN KAISHA; NISSAN KISEN KAISHA, LTD.; TOHO KAIUN KAISHA, LTD.; IINO KAIUN KAISHA, LTD.; MITSUBISHI KAIUN KAISHA, LTD.; KOKUSAI KAIUN KAISHA, LTD.; NIPPON YUSEN KAISHA; OSAKA SHOSEN KAISHA, LTD.; SHINNIHON STEAMSHIP CO., LTD.; YAMASHITA KISEN KAISHA; WILHELMSEMS DAMPSKIBSAKTIESELSKAB; A/S DEN NORSKE AFRIKA-OG AUSTRALIELINIE; A/S TONSBERG; A/S TANKFART I; A/S TANKFART IV; A/S TANKFART V; A/S TANKFART VI; SKIBASKTIESELSKAPET VARILD; SKIBASKTIESELSKAPET MARINA; AKTIESELSKABET GLITTRE; DAMPSKIBSINTERESSENTSKABET GARONNE; SKIBSAKTIESELSKAPET SANGSTAD; SKIBSAKTIESELSKAPET SOLSTAD; SKIBSAKTIESELSKAPET SILJESTAD; DAMPSKIBSAKTIESELSKABET INTERNATIONAL; SKIBSAKTIESELSKAPET MANDEVILLE; SKIBSAKTIESELSKAPET GOODWILL; DAMPSKIBSSELSKABET AF 1912 AKTIESELSKAB; AKTIESELSKABET DAMPSKIBSSELSKABET SVENDBORG; SKIBSAKTIESELSKAPET IGADI; A/S BESCO; AKTIESELSKAPET IVARANS REDERI; A/S LISE; THE DE LA RAMA STEAMSHIP CO., INC.; THE OCEAN STEAM SHIP CO., LTD.; THE CHINA MUTUAL STEAM NAVIGATION CO., LTD.; NEDERLANDSCHE STOOMVAART MAATSCHAPPIJ "OCEAAN" N. V.; THE SWEDISH EAST ASIA CO., LTD.; WATERMAN STEAMSHIP CORPORATION; LYKES BROS. STEAMSHIP CO., INC.; UNITED STATES LINES COMPANY; STATES MARINE CORPORATION; STATES MARINE CORPORATION OF DELAWARE; DAIDO KAIUN KAISHA; AMERICAN PRESIDENT LINES, LTD.,

Petitioners,

—against—

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., and EZRA TAFT BENSON, Secretary of Agriculture,

Respondents.

REPLY BRIEF OF PETITIONERS

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THE COURT PRESS, N. Y. C.

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Supreme Court of the United States.

OCTOBER TERM, 1953.

No. 700.

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, *et al.*,

Petitioners,

—against—

UNITED STATES OF AMERICA; ISBRANDTSEN COMPANY, INC.; and FEDERAL MARITIME BOARD, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONERS, JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, *et al.*

I

The pendency of proceedings before the Board are not a valid basis for the denial of certiorari.

In its Brief in Opposition respondent Isbrandtsen has urged that since the additional proceedings called for by the Board's order refusing to suspend the institution of the proposed contract/non-contract rates are now pending before the Board,[1] review of that order

[1] Although Isbrandtsen has described these proceedings as "approaching their conclusion" (Isbrandtsen Brief in Opposition, p. 24), a final determination will not be forthcoming for many months. Extensive briefs to the examiner were filed on May 24th. Prior to the Board's decision, an examiner's report must be prepared, after consideration of these briefs, over 4,600 pages of testimony and 146 exhibits, exceptions may be taken to the report by the parties, and thereafter briefs and oral argument presented to the Board itself.

by this Court is premature (Isbrandtsen Brief, pp. 23-4). The theory of respondent is apparently that since the lower courts decision will have no effect after the Board renders its final order on the proposal, it is not of sufficient importance to warrant review by this Court.

The legal issues raised by this case and the legal issues involved in the proceedings now before the Board which raise questions of whether and under what circumstances the Board should disapprove the use of contract/non-contract tariffs are separate and distinct. For example, the latter will not resolve the issue whether, as a matter of law, separate and prior approval of the use of a contract/non-contract tariff is required under Section 15 of the Shipping Act, 1916. Petitioners sought to emphasize in their petition and brief the far-reaching practical importance of the decision below—an importance wholly independent of and unaffected by what may be the outcome of the proceedings now before the Board (Petitioners' Brief, pp. 10-4). The day following the filing of the petition for certiorari in this Court, the Supreme Court of Oregon, relying upon the decision of the court below, ruled that a conference could not sue a shipper for violation of a contract entered into by the shipper in order to avail himself of a contract tariff, since the use of contract/non-contract tariffs by the conference was illegal, it not having been previously and specifically approved by the Board. *Pacific Westbound Conference* v. *Leval & Co.,* decision filed April 21, 1954 (58 Oregon Sup. Ct. Advance Sheets 677). For the convenience of the Court, this decision has been reproduced as an Appendix hereto. This decision demonstrates that the practical and far-reaching consequences of the decision of the Court

of Appeals for the District of Columbia Circuit—consequences which petitioner outlined in its petition —were not mere idle speculation but are already materializing so as to justify petitioner's original contention that the decision below is of such general importance to the foreign commerce of the United States and to the administration and construction of the Shipping Act, 1916, as to require its review by this Court.

II

There is no "decisive" precedent supporting the action of the court below.

Respondents have urged that the decision below is not novel and that *Isbrandtsen Co.* v. *United States,* 81 F. Supp. 544, appeal dismissed *sub nom. A/S Ludwig Mowinckels Rederi* v. *Isbrandtsen Co.,* 336 U. S. 941 is "decisive" of the issues here presented (Respondent United States Brief, p. 10; Respondent Isbrandtsen Brief, p. 15).

That decision preceded the adoption by the Board of General Order 76. At that time there was no defined procedure whereby a shipper or competing carrier could protest the institution of a contract/non-contract tariff and obtain a suspension order from the Board against the adoption of the tariff even if the Board believed such action desirable. Indeed, that decision rested upon the finding that "the Commission disclaims the power to afford temporary relief" (81 F. Supp. at 546) against the adoption of the contract/non-contract tariffs there in question and the conclusion that the court, as a court of equity, could therefore fill the hiatus and act to maintain the status quo if the equities so demanded.

In its Motion to Affirm in that case (the only such motion that was filed), Isbrandtsen described the action taken by the District Court (at p. 4) as follows:

> "Therefore, in view of the fact that the Commission lacked power to prevent the carriers from inflicting irreparable injury upon the plaintiff pursuant to the approved agreements, the District Court, in order to preserve the status quo pending further Commission proceedings, temporarily suspended the Conference Agreements and temporarily enjoined defendant carriers from effectuating their threat to institute the exclusive patronage system."

In urging that the Supreme Court affirm that decision, Isbrandtsen argued (at p. 7):

> "In any case, it is familiar law that the application for an interlocutory injunction is addressed to the sound discretion of the trial court and that an order either granting or denying such an application will not be disturbed by an Appellate Court unless the injunction was improvidently issued. . . . Certainly the issuance of the temporary injunction here could hardly be considered an abuse of the admitted discretion residing in the District Court to preserve the equities before it."

This should be contrasted with the statement of Isbrandtsen on page 15 of its brief in this proceeding:

> "This [*Isbrandtsen* v. *United States*] was a square holding that an exclusive patronage system could not be effectuated prior to agency approval and judicial review of such agency action."

The language of the Department of Justice on pages 11 and 12 of its brief similarly ascribes this broad interpretation to the decision in *Isbrandtsen* v. *United States,* an interpretation Isbrandtsen did not rely upon in urging the Supreme Court to affirm that decision.

General Order 76 has, however, created a procedure whereby the Board and all interested parties are advised of the proposed adoption of contract/non-contract tariffs and which permits the Board to grant the exact relief, the absence of which at the time was the basis for the court's intervention and action in *Isbrandtsen Co.* v. *United States, supra.* The instant case thus raises issues wholly distinct from those presented in that case and the decision therein is in no wise here controlling. It is submitted that there is no precedent to support the action of the court below.

CONCLUSION

For the reasons stated above and for the reasons set forth in the petition for certiorari, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 25, 1954.

APPENDIX

IN THE

SUPREME COURT OF THE STATE OF OREGON

PACIFIC WESTBOUND CONFERENCE, et al.,
Appellants,

vs.

LEVAL & CO., INC., a New York corporation,
Respondent and
Cross-Appellant.

Before LATOURETTE, *Chief Justice,* and WARNER, POSSMAN, LUSK, BRAND and PERRY, *Justices.*

PERRY, *J.*

The plaintiffs are a voluntary association of numerous common carrier steamship companies duly organized under the authority of Title 46, U. S. C. A., cited as the "Shipping Act of 1916", and operating under the name of Pacific Westbound Conference. The members of the association operate ships in regular service, carrying cargo west-bound from ports on the Pacific coast of the United States and Canada to ports in the far East.

The defendant, a corporation with its principal office in New York City, New York, maintaining a branch office in Portland, Oregon, is an extensive shipper of merchandise and other commodities by steamship.

In October, 1946, the plaintiffs entered into a contract with the defendant (the contract being desig-

nated as "Pacific Westbound Conference General Commodity Contract Rate Agreement") which provided that the defendant would consign all of its cargo shipments from Pacific coast ports via ships of carriers belonging to the Pacific Westbound Conference, and in consideration of the exclusive use of Conference ships, the defendant was to receive a lower tariff rate than that of a shipper who did not enter into such an exclusive contract of carriage. This exclusive contract of carriage, however, was not limited solely to the defendant, but was open to anyone who desired to enter into such an agreement.

The contract between the plaintiffs and the defendant also provided that should the defendant ship cargo with a carrier who was not a member of the Conference, then the shipper had breached the contract and would be liable in damages in a sum equal to the contract tariff of the shipment, this amount being agreed to as liquidated damages in lieu of actual damages because of the impossibility or impracticability of determining the actual damage suffered by the plaintiffs.

The original contract as entered into was from time to time amended as to rates and terms by mutual agreement of the parties, the last revision and acceptance being on May 15, 1949.

In September, 1949, the defendant in violation of the contract agreement made a shipment from Astoria using a foreign flag vessel which was not a member of the Conference, and this action was brought by the plaintiffs for damages suffered by breach of the contract. The matter was tried to the circuit court without a jury, the trial court finding that there had been a breach of the contract, but denying the plaintiffs a recovery. Subsequent to a determination by the trial court that the plaintiffs could not recover

liquidated damages as provided in the contract, the court permitted the cause to be reopened and the court determined the actual amount of damages, but still denied recovery. The plaintiffs have appealed from the adverse judgment of the court, and the defendant has cross-appealed, claiming that the trial court was in error in permitting the plaintiffs to reopen the case for the purpose of proving their actual damages.

The serious question that confronts this court is whether or not it is necessary that the conference agreement and its amendments as entered into between the steamship companies in order to give validity to the contract of carriage as sued upon must set forth the proposed dual contract rate program and be approved by the United States Maritime Commission prior to the execution of the General Commodity Contract Rate Agreement, or, in lieu thereof, that the General Commodity Contract Rate Agreement between these parties be first formally approved by the United States Maritime Commission.

The answer to this question must be determined from the construction of Title 46, USCA, and particularly § 814 thereof, which reads as follows:

> "Every common carrier by water, or other person subject to this chapter, shall file immediately with the commission a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling,

regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

"The commission may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

"Agreements existing at the time of the organization of the commission shall be lawful until disapproved by the commission. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the commission.

"All agreements, modifications, or cancellations, made after the organization of the commission shall be lawful only when and as long as approved by the commission, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

"Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto."

The memorandum of agreement which bound the various carriers together into the Pacific Westbound Conference was made and entered into on the 8th day of January, 1923, and duly approved by the Maritime Board (now existing as the United States Maritime Commission) on June 26, 1923. This agreement has from time to time been amended by the members of the Conference and the amendments duly approved by the United States Maritime Commission. The members of the Westbound Conference provide by their contract that their association together "is for the regulation of traffic and not of operation and only covers rates, tariffs, brokerage and matters directly relating thereto", and the parties to the Conference "agree and stipulate with each other that they will be bound by the agreement of two-thirds of their number * * * as to any tariff, freight rate, charge, brokerage, traffic regulation and/or, any other matter within the scope of this agreement with the same force and effect as if expressly made a part hereof." It is, therefore, readily seen that the action of two-thirds of the members of the Conference in determining tariff rates and approving lower rates to exclusive users of Conference lines effects a change or modification in the agreement of the parties binding upon all members of the Conference.

Section 814 of Title 46, U. S. C. A., hereinbefore set out, provides that the term "agreement" as used in the act includes "understandings" and "other arrangements", and that all agreements, modifications

or cancellations made subsequent to the organization of the Commission under the act *shall be lawful only when approved by the Commission and that it shall be unlawful, directly or indirectly, to carry out any agreement or understanding or practice until approved.*

Thus an agreement of dual rates as set forth in the contract sued upon is subject to the control of the United States Maritime Commission. The reason for this is readily understandable because the shipping act of 1916 permits the combining of a group of carriers and action by them that would be unlawful under §§ 1-11 and 15 of Title 15, U. S. C. A., and the amendments and acts supplementary thereto, generally referred to as the Sherman Antitrust Act and the Clayton Act, and while, because of necessity in connection with the maintenance of adequate sea transportation for this country, Congress felt that the steamship companies could combine and operate to some extent in restraint of trade and carry on a monopolistic practice, for the protection of the public interest this was to be permitted only under due and proper supervision. The shipping act provides for prior approval.

We are impressed with the reasoning of the United States Court of Appeals for the District of Columbia Circuit in the case of *Isbrandtsen Company, Inc.,* v. *United States of America and Federal Maritime Board, et al.,* —— F. 2d —— (decided January 21, 1954), wherein it is stated:

> "* * * This pre-approval illegality stems from the fact that the Shipping Act specifically provides machinery for legalizing that which would otherwise be illegal under the anti-trust laws.

> The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the anti-trust laws any more than is necessary to serve the purposes of the regulatory statute. But until this is done, the agreement is subject to the operation of the anti-trust laws, under which price fixing agreements are illegal per se."

The Conference agreement and its amendments and changes as approved by the Maritime Commission does not provide for a reduced rate to shippers exclusively using ships of the Pacific Westbound Conference, and it is admitted that the contract of the parties litigant although filed was never approved. We are of the opinion that there must first be formal approval of this practice as to this particular Conference by the United States Maritime Commission before such an agreement is enforceable between the Conference and a shipper.

The pleadings and the evidence failing to show the necessary approval by the United States Maritime Commission, the circuit court was correct in its result.

Since we view the contract as being "unlawful" and, therefore, unenforceable before approval by the United States Maritime Commission, it is unnecessary to consider the other issues of error claimed by the parties.

The judgment of the trial court is affirmed.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 700

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE; ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., AND EZRA TAFT BENSON, SECRETARY OF AGRICULTURE,

Respondents

No. 703

FEDERAL MARITIME BOARD,

Petitioner,

vs.

UNITED STATES OF AMERICA AND ISBRANDTSEN COMPANY, INC.,

Respondents

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Pacific Westbound Conference respectfully moves for leave to file a brief amicus curiae in the matter of the petitions for writ of certiorari filed by Federal Maritime Board and Japan-Atlantic and Gulf Freight Conference. Consent to the filing of such a brief has been given by petitioners Federal Maritime Board and Japan-Atlantic and Gulf Freight Conference and by respondents United

States of America and Ezra Taft Benson, Secretary of Agriculture, but has been refused by respondent Isbrandtsen Company, Inc.

While under this Court's Rule 27-b, motions such as this are not favored, we believe there exist strong reasons to support the granting of this motion. These reasons are that such brief will bring to the Court's attention the decision of the Supreme Court of Oregon in the case of *Pacific Westbound Conference* vs. *Leval & Co., Inc.*, 58 Oregon Supreme Court Advance Sheets 677, —P. 2d —, which was decided April 21, 1954, which was after the petition for writ of certiorari in *Japan-Atlantic and Gulf Freight Conference* vs. *United States of America, et al.*, was filed, and the widespread ill effects of the decision sought to be reviewed herein upon steamship conferences such as this applicant, Pacific Westbound Conference.

Applicant's Interest

Applicant will file a petition for writ of certiorari to the Supreme Court of Oregon in the case of *Pacific Westbound Conference* vs. *Leval & Co., Inc.* A petition for re-hearing in that case was denied May 19, 1954. This petition for a writ of certiorari will present the same important question presented by the petitions of the Federal Maritime Board and Japan-Atlantic and Gulf Freight Conference herein, namely, whether Section 15 of the Shipping Act, 1916, requires the Board to give prior separate approval to the use of contract/non-contract rates by common carriers in foreign trade whose conference agreements approved by the Board, provide for and contemplate the collective fixing of lawful rates.

No other question will be presented by the petition to be filed by applicant, as the decision of the Oregon Supreme Court was decided upon that single issue. Applicant's petition for a writ of certiorari is not yet ready to be filed.

It will be filed in due time to permit the court to hear applicant's case without delay at the same time as the instant case.

Reasons in Support of Motion

Applicant, like petitioner Japan-Atlantic and Gulf Freight Conference, is an association of steamship carriers engaged in foreign commerce. For many years, applicant has used contract/non-contract rates. Upon the basis of the principle adopted by the United States Court of Appeals for the District of Columbia Circuit herein and upon authority of that case applicant's system of contract/non-contract rates has been held illegal by the Oregon Court in *Pacific Westbound Conference* v. *Leval & Co., Inc.*, cited above.

The decision of the United States Court of Appeals for the District of Columbia Circuit will have widespread harmful effect. It rejects a long-established administrative practice which we believe to be both reasonable and necessary to the steamship conferences and to the efficient action of the Federal Maritime Board.

The petitions present a question of interpretation of Section 15 of the Shipping Act, 1916. The long-existing interpretation of Section 15 by the Shipping Board and its successors has been that organic conference agreements are approved by the Board, but that action pursuant to the basic organic conference agreement, including the introduction of common contract/non-contract rates did not require prior approval by the Board under Section 15, if such action was intra vires the authority granted the conference under its approved conference agreement. Since its organization and the approval of its conference agreement in 1923, applicant, Pacific Westbound Conference, has kept the Board informed of its actions under the conference agreement by submitting to the Board, pursuant to regulation, copies of its minutes, all its rates, rate changes, rules adopted, and forms of

agreements with its shippers. The changes in rates submitted by this conference have been many and continuous. The Board has reviewed this data and frequently, through its staff, has requested action of the conference, such as changing provisions of its contracts with shippers and provisions of its tariff regulations.

As early as 1927, in *Ex Parte 4,* a Section 15 inquiry, 1 U.S.S.B. 121, the predecessor of the Federal Maritime Board, United States Shipping Board, construed Section 15 as not requiring specific approval by the Board of routine operations such as rates, rate changes and other day-to-day transactions by the carriers under conference agreements, as this would be impracticable and would result in delays and inconvenience to both carriers and shippers. It would have been impracticable and contrary to the legislative intent for the Board to have adopted a scheme of administrative approval of each rate filed and each action taken by the conferences in operating from day to day under their organic agreements. The contract rate systems were in general use and were well known to the successive shipping boards.

Many freight conferences, like applicant, have long been operating under contract/non-contract rate tariffs without specific prior approval by the Board of such rates or of any of the multitude of changes of such rates which occur regularly in the operation of the conference under its organic agreement. Applicant's agreement was approved by the Shipping Board in 1923.

The decision in the court below means, not only that this conference has been acting illegally, although in full conformity with the established administrative procedure and with the knowledge of the Board, but it also means that the conference and other conferences in foreign trade will have to accept an impracticable procedure for obtaining ap-

provals which will constitute a serious obstacle to carrying on their functions. It is essential that steamship conferences institute rates and rate changes promptly to meet competitive and economic changes in their trades. The delay incident to a procedure of formal approval by the Board administering the Shipping Act would result in injury to the conferences, as experience in the past as to delays has many times shown.

It is respectfully requested, on the above grounds, that this application for leave to file a brief as amicus curiae be granted.

Respectfully submitted,

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BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONS OF FEDERAL MARITIME BOARD AND JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE

The decision of the United States Court of Appeals for the District of Columbia is of such widespread importance to the foreign commerce of the United States and to the administration and construction of the Shipping Act, 1916, as to warrant its review by this Court.

In *Pacific Westbound Conference et al.* v. *Leval & Co.*, —— Oregon Dec. ——, —, Pac. 2d —, 58 Oregon Supreme Court Advance Sheets p. 677, decided April 22, 1954, a decision of the court below in favor of defendant based upon alleged invalidity of the liquidated damage clause in the Conference's contract with a shipper was affirmed upon appeal upon the sole ground that the conference's dual rate contract required formal approval by the Federal Maritime Board. A copy of the Court's opinion is included herein as Appendix "A". The Court relied upon the decision in the United States Court of Appeals for the District of Columbia, as to which petitions for writs of certiorari have been filed herein by the Federal Maritime Board and by Japan-Atlantic and Gulf Freight Conference.

The latter case is a reversal of a well-established and long-standing construction given to Section 15 of the Shipping Act, 1916, by the Board and its predecessors. It will require the Board to make radical changes in the methods used by the Board to administer the Act. The decision will have adverse effects upon conferences of carriers operating in foreign trade of the United States.

Under Section 15 of the Shipping Act, 1916 (46 U. S. C. Sec. 814), "every" rate-fixing agreement between common carriers by water in the foreign commerce of the United States must be filed with the Board for approval.

While, strictly speaking, every determination of a rate by a conference is an agreement between the member lines, the Board, in *Ex Parte 4,* Section 15 inquiry, 1 U. S. S. B. 121 (1927), conducted a formal rule-making proceeding and concluded that Section 15 did not call for the filing and approval of *every* concerted action by carriers, but only those "agreements whereby the carriers propose to be governed in their conference activities . . . . Such agreements are to be distinguished from the routine of conference activities." (emphasis supplied)

Under Section 5a (2) of the Interstate Commerce Act (49 USC 5b) and Section 4b of the Civil Aeronautics Act (49 USC 492-494) both of which were modeled on Section 15 of the Shipping Act, specific rates are not approved and only the basic enabling agreement authorizing the use of such rates requires approval (Senate Report No. 44, 80th Congress accompanying S. 110, pages 13-14).

This administrative rule requiring the approval of organic agreements of conferences, but not every action taken pursuant to such agreements, has afforded a workable arrangement for conference rate regulation. The practice has been followed for many years by the Board. Rates and tariff rules adopted by the conferences are required to meet the standards provided for in sections of the Shipping Act, and that Act provides for complaints by the Board or by third parties. Accordingly, there is ample protection for injured persons if a conference establishes a rate or rates which violate the terms of the Act.

Pacific Westbound Conference supports petitioners herein because it believes that the forced withdrawal of the Board's long-established practice referred to above will necessarily have a profound effect upon the daily activities of conferences which have been governed by, and have relied upon, that practice.

We believe that the administrative practice of the Board has been sound and practical. A statutory construction followed for so long a time by the administrative agency charged with the administration of the Shipping Act is entitled to great weight. See *Hirshberg* v. *Cooke*, 336 U. S. 210 (1949).

Whether a given conference activity constitutes an "agreement" within the meaning of Section 15 is within the Board's primary exclusive jurisdiction. *Far East Conference* v. *U. S.*, 342 U. S. 570 (1952); *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 486 (1932).

An administrative agency of the Government should have sufficiently broad authority to carry out effectively the work assigned to it by statute.

Serious effects will necessarily follow if the opinion below is to be controlling. A large number of the conferences of lines operating regular or berth services from United States ports to all parts of the world presently employ contract/non-contract rates. The decision below means that all of the carriers in these conferences, relying upon long-established administrative practice, have been and are acting illegally. This may result in the members of the conference being faced with a multitude of suits for damages and reparations and to actions for penalties under Section 15, since although the Board was aware of such practices, they were technically violative of the Shipping Act, inasmuch as they had not been specifically approved.

Conclusion

For the foregoing reasons, it is respectfully submitted that the petitions of Federal Maritime Board and Japan-Atlantic and Gulf Freight Conference should be granted.

Respectfully submitted,

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APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF OREGON

Received Apr. 22, 1954, Grosscup, Ambler, Stephan & Miller.

Pacific Westbound Conference: AMERICAN HAWAIIAN STEAMSHIP COMPANY, AMERICAN MAIL LINE, LTD., AMERICAN PRESIDENT LINES, LTD., BANK LINE, LTD., BLUE FUNNEL LINE, OCEAN STEAM SHIP CO., LTD., CHINA MUTUAL STEAM NAVIGATION CO., LTD., NEDERLANDSCHE STOOMVAART MAATSCHAPPIJ "OCEAN", CANADIAN PACIFIC STEAMSHIPS, LTD., DE LA RAMA LINES, THE DE LA RAMA STEAMSHIP CO., INC., SWEDISH EAST ASIATIC CO., LTD., EAST ASIATIC CO., LTD., ELLERMAN & BUCKNALL STEAMSHIP CO., LTD., AMERICAN & MANCHURIAN LINE, FERN LINE, FEARNLEY & EGER and A. F. KLAVENESS & CO. A/S, ISTHMIAN STEAMSHIP COMPANY, IVARAN LINES, FAR EAST SERVICE, JAVA PACIFIC LINE, N. V. STOOMVAART MAATSCHAPPIJ "NEDERLAND", KONINKLIIKE ROTTERDAMASCHE LLOYD, N. V.; KLAVENESS LINE, A. F. KLAVENESS & CO., A/S, LANCASHIRE SHIPPING COMPANY LIMITED (CASTLE LINE), A. P. MOLLER-MAERSK LINE, PACIFIC FAR EAST LINE, INC., PACIFIC ORIENT EXPRESS LINE, DITLEY-SIMONSEN LINES, TRANSATLANTIC STEAMSHIP CO., LTD., PACIFIC TRANSPORT LINES, INC., PRINCE LINE, LTD., SALEN-SKAUGEN LINE, REDERI A.-B. PULP, REDERI A.-B. JAMAICA, D/S A/S EIKLAND, SALAMIS A/S, SILVER LINE, LTD., STATES MARINE CORPORATION, STATES MARINE CORPORATION OF DELAWARE, STATES STEAMSHIP COMPANY, SUDDEN & CHRISTENSON, INC., WESTERN CANADA STEAMSHIP COMPANY, LTD., WILH. WILHELMSEN, *Appellants*,

vs.

LEVAL & CO., INC., a New York Corporation, *Respondent and Cross-appellant*

* * * * * * *

Appeal from Circuit Court, Multnomah County.
Martin W. Hawkins, Judge.
Argued and submitted March 17, 1954.

Albert E. Stephan, of Seattle, Washington, argued the cause for appellants. With him on the briefs was Allan Hart, of Portland.

James P. Cronan, Jr., of Portland, argued the cause for respondent and cross-appellant. With him on the briefs were Donald A. Schafer and Schafer, Holbrook & Cronan, of Portland.

Before Latourette, Chief Justice, and Warner, Possman, Lusk, Brand and Perry, Justices.

PERRY, *J.* Affirmed.

Filed Apr. 21, 1954.

F. M. SERCOMBE,
Clerk,
(Supreme Court of Oregon),
By —— ——,
Deputy.

PERRY, *J.:*

The plaintiffs are a voluntary association of numerous common carrier steamship companies duly organized under the authority of Title 46, USCA, cited as the "Shipping Act of 1916", and operating under the name of Pacific Westbound Conference. The members of the association operate ships in regular service, carrying cargo west-bound from ports on the Pacific coast of the United States and Canada to ports in the far East.

The defendant, a corporation with its principal office in New York City, New York, maintaining a branch office in Portland, Oregon, is an extensive shipper of merchandise and other commodities by steamship.

In October, 1946, the plaintiffs entered into a contract with the defendant (the contract being designated as "Pacific Westbound Conference General Commodity Contract Rate Agreement") which provided that the defendant would consign all of its cargo shipments from Pacific coast ports via ships of carriers belonging to the Pacific Westbound Conference, and in consideration of the exclusive use of Conference ships, the defendant was to receive a lower tariff

rate than that of a shipper who did not enter into such an exclusive contract of carriage. This exclusive contract of carriage, however, was not limited solely to the defendant, but was open to anyone who desired to enter into such an agreement.

The contract between the plaintiffs and the defendant also provided that should the defendant ship cargo with a carrier who was not a member of the Conference, then the shipper had breached the contract and would be liable in damages in a sum equal to the contract tariff of the shipment, this amount being agreed to as liquidated damages in lieu of actual damages because of the impossibility or impracticability of determining the actual damage suffered by the plaintiffs.

The original contract as entered into was from time to time amended as to rates and terms by mutual agreement of the parties, the last revision and acceptance being on May 15, 1949.

In September, 1949, the defendant in violation of the contract agreement made a shipment from Astoria using a foreign flag vessel which was not a member of the Conference, and this action was brought by the plaintiffs for damages suffered by breach of the contract. The matter was tried to the circuit court without a jury, the trial court finding that there had been a breach of the contract, but denying the plaintiffs a recovery. Subsequent to a determination by the trial court that the plaintiffs could not recover liquidated damages as provided in the contract, the court permitted the cause to be reopened and the court determined the actual amount of damages, but still denied recovery. The plaintiffs have appealed from the adverse judgment of the court, and the defendant has cross-appealed, claiming that the trial court was in error in permitting the plaintiffs to reopen the case for the purpose of proving their actual damages.

The serious question that confronts this court is whether or not it is necessary that the conference agreement and its amendments as entered into between the steamship companies in order to give validity to the contract of carriage as sued upon must set forth the proposed dual contract rate program and be approved by the United States Maritime

Commission prior to the execution of the General Commodity Contract Rate Agreement, or, in lieu thereof, that the General Commodity Contract Rate Agreement between these parties be first formally approved by the United States Maritime Commission.

The answer to this question must be determined from the construction of Title 46, USCA, and particularly § 814 thereof, which reads as follows:

> "Every common carrier by water, or other person subject to this chapter, shall file immediately with the commission a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.
>
> "The commission may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.
>
> "Agreements existing at the time of the organization of the commission shall be lawful until disapproved by the commission. It shall be unlawful to carry out any

agreement or any portion thereof disapproved by the commission.

"All agreements, modifications, or cancellations, made after the organization of the commission shall be lawful only when and as long as approved by the commission, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

"Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto."

The memorandum of agreement which bound the various carriers together into the Pacific Westbound Conference was made and entered into on the 8th day of January, 1923, and duly approved by the Maritime Board (now existing as the United States Maritime Commission) on June 26, 1923. This agreement has from time to time been amended by the members of the Conference and the amendments duly approved by the United States Maritime Commission. The members of the Westbound Conference provide by their contract that their association together "is for the regulation of traffic and not of operation and only covers rates, tariffs, brokerage and matters directly relating thereto", and the parties to the Conference "agree and stipulate with each other that they will be bound by the agreement of two-thirds of their number * * * as to any tariff, freight rate, charge, brokerage, traffic regulation and/or, any other matter within the scope of this agreement with the same force and effect as if expressly made a part hereof." It is, therefore, readily seen that the action of two-thirds of the members of the Conference in determining tariff rates and approving lower rates to exclusive users of Conference lines effects a change or modification in the agreement of the parties binding upon all members of the Conference.

Section 814 of Title 46, USCA, hereinbefore set out, provides that the term "agreement" as used in the act includes "understandings" and "other arrangements", and that all agreements, modifications or cancellations made subsequent

to the organization of the Commission under the act *shall be lawful only when approved by the Commission and that it shall be unlawful, directly or indirectly, to carry out any agreement or understanding or practice until approved.*

Thus an agreement of dual rates as set forth in the contract sued upon is subject to the control of the United States Maritime Commission. The reason for this is readily understandable because the shipping act of 1916 permits the combining of a group of carriers and action by them that would be unlawful under §§ 1-11 and 15 of Title 15, UCLA, and the amendments and acts supplementary thereto, generally referred to as the Sherman Antitrust Act and the Clayton Act, and while, because of necessity in connection with the maintenance of adequate sea transportation for this country, Congress felt that the steamship companies could combine and operate to some extent in restraint of trade and carry on a monopolistic practice, for the protection of the public interest this was to be permitted only under due and proper supervision. The shipping act provides for prior approval.

We are impressed with the reasoning of the United States Court of Appeals for the District of Columbia Circuit in the case of Isbrandtsen Company, Inc., v. United States of America and Federal Maritime Board, et al., — F.2d —, (decided January 21, 1954), wherein it is stated:

> "* * * This pre-approval illegality stems from the fact that the Shipping Act specifically provides machinery for legalizing that which would otherwise be illegal under the anti-trust laws. The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the anti-trust laws any more than is necessary to serve the purposes of the regulatory statute. But until this is done, the agreement is subject to the operation of the anti-trust laws, under which price fixing agreements are illegal per se."

The Conference agreement and its amendments and changes as approved by the Maritime Commission does not provide for a reduced rate to shippers exclusively using

ships of the Pacific Westbound Conference, and it is admitted that the contract of the parties litigant although filed was never approved. We are of the opinion that there must first be formal approval of this practice as to this particular Conference by the United States Maritime Commission before such an agreement is enforceable between the Conference and a shipper.

The pleadings and the evidence failing to show the necessary approval by the United States Maritime Commission, the circuit court was correct in its result.

Since we view the contract as being "unlawful" and, therefore, unenforceable before approval by the United States Maritime Commission, it is unnecessary to consider the other issues of error claimed by the parties.

The judgment of the trial court is affirmed.